ANYTHING BECAUSE THE OFFICERS GAVE ME A FIELD TEST AND SAID I PASSED IT. AND THEN SERGEANT SAID, "OH, NO. NO WAY. GIVE HIM A BREATH TEST."

BY MR. LINK:

Q. SO THEY GIVE YOU A BREATH TEST?

A. THEY GAVE ME A FIELD TEST AND A BREATH TEST.

Q. DO YOU KNOW WHAT THE BREATH TEST WAS?

A. WELL, I HAD TOLD THEM I HAD DRANK -- I HAD A BEER AND ALL THAT. BUT I DON'T KNOW THE NUMBERS ON THE TEST.

Q. OKAY.

A. NO, I DON'T.

Q. SO IT'S FAIR TO SAY, THOUGH, THAT YOU WERE DRINKING THAT NIGHT, CORRECT?

A. I HAD A BEER THAT NIGHT.

Q. YOU WERE BAFFLED, CORRECT?

A. NOT NOTHING ALCOHOL INDUCED.

Q. NO, BUT YOU WERE BAFFLED?

MR. GULLEY: OBJECTION, YOUR HONOR. VAGUE IN TERMS OF TIMES. MISSTATING THE TESTIMONY.

BY MR. LINK:

Q. YOU WERE BAFFLED, WEREN'T YOU?

A. WHEN I CAME HOME.

Q. OKAY. SO YOU HAD BEEN DRINKING, YOU'RE BAFFLED. AT SOME POINT YOU SAID YOU WERE ANGRY BECAUSE THEY WERE YELLING AT YOU, CORRECT?

A. I DON'T KNOW WHAT YOU'RE LEADING UP TO. YOU'RE GOING TO HAVE TO WALK ME THROUGH THIS BECAUSE IT'S ALL DIFFERENT TIMES. IT WAS -- THIS CAME IN DIFFERENT FRAMES ALL

ALONG. I COULD SAY I WAS ANGRY. I WASN'T ANGRY AT THE WORDS, BUT I WAS UPSET WHEN I CAME IN AND I SEEN MY PROPERTY MISSING. I WAS BAFFLED WHEN I TRIED TO RETRIEVE IT AND WHY THE PEOPLE I HAD TO RETRIEVE IT FROM, WHY IT HAPPENED. I WASN'T DRUNK AT ALL, IF THAT'S WHAT YOU'RE TRYING TO ASK ME.

Q. BUT YOU HAD BEEN DRINKING?

A. NO, I HAD A BEER.

Q. AND YOU WEREN'T IN A GOOD STATE OF MIND, WERE YOU?

A. NO, I WAS IN A GREAT STATE OF MIND. I CAME FROM A NICE OUTING.

Q. HOLD ON. YOUR PLACE HAD JUST BEEN BROKEN INTO, CORRECT? YOU WENT AND UNLOCKED YOUR BOX, GOT A SHOTGUN, CORRECT? YES OR NO?

A. NOT IN THEM STAGES.

Q. AT SOME POINT YOU UNLOCKED THE BOX AND GOT YOUR SHOTGUN, CORRECT?

A. IF YOU ASK ME THAT IN STAGES I CAN ANSWER THAT BETTER.

Q. AT ANY POINT ON THE 12TH, DID YOU UNLOCK YOUR BOX AND GET A SHOTGUN? IT'S A VERY SIMPLE QUESTION.

A. WHEN I THOUGHT I MIGHT HAVE TO BE DEFINITIVE OR MAKE SURE NOBODY HIT ME IN THE HEAD WITH A BAT, YES.

Q. SO THAT'S A YES, RIGHT?

A. YES.

Q. SO YOU WALKED UPSTAIRS WITH THAT SHOTGUN?

A. YEP.

Q. AND THEN YOU WALKED -- YOU EVENTUALLY WALKED DOWNSTAIRS AND GOT IN YOUR CAR, CORRECT?

A. EVENTUALLY GOT IN MY CAR, THAT'S HOW I GOT TO -- THAT'S WHEN THEY STOPPED ME.

Q. AND YOU'RE IN A GREAT STATE OF MIND?

MR. GULLEY: OBJECTION. ARGUMENTATIVE. VAGUE AS IN TERMS OF TIME.

THE COURT: OVERRULED.

BY MR. LINK:

Q. AND YOU'RE IN THIS GREAT STATE OF MIND?

A. I WAS IN A STATE OF MIND LIKE -- YOU WANT TO KNOW THE STATE OF MIND?

Q. WELL, YOU SAID YOU WERE IN A GREAT STATE OF MIND.

A. YEAH, I HAD A NICE WEEKEND WITH MY DAUGHTER. I CAME FROM A NICE OUTING. I MADE A LITTLE EXTRA MONEY. I MADE -- I WAS IN A GOOD MIND WHERE I COULD CHOP IT OFF AS A LOSS.

MR. LINK: OBJECTION. NONRESPONSIVE.

THE COURT: OVERRULED.

BY MR. LINK:

Q. WHEN YOU GOT IN YOUR CAR AND YOU TOOK OFF, WHERE WERE YOU HEADED?

A. I WAS HEADED WESTBOUND.

Q. WERE YOU GOING TO THE SUPERMARKET?

A. WAS I GOING TO THE SUPERMARKET? THAT'S FUNNY. NO, I WASN'T GOING TO THE SUPERMARKET, SIR.

Q. WHERE WERE YOU GOING?

A. I WAS GOING TO MY MOM'S HOUSE.

Q. SO YOU GET IN YOUR CAR WITH YOUR SHOTGUN AND YOU'RE HEADED TO YOUR MOM'S HOUSE?

A. YEAH.
Q. IS THAT WHERE YOU KEEP YOUR SHOTGUN SOMETIMES?
MR. GULLEY: OBJECTION.
THE COURT: SUSTAINED.
BY MR. LINK:
Q. YOU FLED THAT NIGHT BECAUSE YOU DIDN'T WANT TO GET ARRESTED FOR ASSAULT WITH A DEADLY WEAPON; ISN'T THAT TRUE?
A. I DON'T KNOW IF YOU CALL IT FLED. I JUST LEFT THE SITUATION.
Q. YOU LEFT THE SITUATION BECAUSE YOU DIDN'T WANT TO GET ARRESTED FOR ASSAULT WITH A DEADLY WEAPON, CORRECT?
A. I DIDN'T WANT TO GET ARRESTED.
Q. YOU DIDN'T WANT TO GET ARRESTED FOR ASSAULT WITH A DEADLY WEAPON?
A. I HADN'T ASSAULTED NO ONE, SO I DIDN'T THINK THAT WOULD BE NO ARREST.
Q. ACTUALLY, THAT IS IN FACT THE REASON YOU FLED, CORRECT?
MR. GULLEY: OBJECTION. ASKED AND ANSWERED.
THE WITNESS: NO, VERY INCORRECT.
THE COURT: THE ANSWER HAS BEEN GIVEN. INCORRECT. NEXT QUESTION.
BY MR. LINK:
Q. YOU RAN THE RED LIGHT BECAUSE YOU WERE -- YOU DIDN'T WANT THE OFFICERS TO CATCH YOU, CORRECT?
A. WELL, THE OFFICERS ARE ON THE RIGHT-HAND SIDE, AND THEN I'M IN THE LEFT-HAND SIDE, TWO OFFICERS. AND I SEE THE TWO OFFICERS. THEY SEE -- I KNOW THE LIGHT IS YELLOW,

CHANGING, WHAT HAVE YOU. IT'S YELLOW WHEN I SEEN IT. ON MY LEFT-HAND SIDE I SEE THE TWO CARS, I SEE THEM COMING WITH THEIR LIGHTS. THAT'S WHY IT WAS JUST --

Q. YOU WERE FLEEING THE SCENE, WEREN'T YOU?

A. FLEEING, NO. I WOULDN'T SAY FLEEING. I WAS LEAVING THE SITUATION.

Q. YOU THREW THE GUN OUT OF THE WINDOW, CORRECT?

A. JUST BEING PRECAUTIOUS.

Q. YOU DIDN'T WANT THE POLICE TO FIND IT?

A. I'M SURE THEY COULD SEE ME. THEY WERE RIGHT IN BACK OF ME. I WANTED THEM TO KNOW THAT, IF ANYTHING, IF IT WAS FOR THEM TO STOP ME LIKE THAT WHERE THEY HAD CAME AT ME WITH THE INFRAREDS OR ALL THAT, I DIDN'T WANT TO GET SHOT FOR HAVING NO SHOTGUN. I HAD SEEN IT IN THE PAST.

Q. IT'S NIGHTTIME, CORRECT?

A. YEAH, WITH INFRAREDS I DIDN'T WANT TO GET SHOT FOR HAVING NO SHOTGUN.

Q. IT'S NIGHTTIME, CORRECT?

A. I SEEN INFRARED LIGHTS.

Q. IT'S NIGHTTIME, CORRECT?

A. OH, YEAH. P.M.

Q. OKAY. I'M JUST TRYING TO KEEP THE QUESTIONS SIMPLE HERE.

IT'S NIGHTTIME, CORRECT, AND THE POLICE WERE BEHIND YOU, CORRECT?

A. THE POLICE, YES.

Q. OKAY. AND YOU THREW THE SHOTGUN OUT THE WINDOW?

A. YEAH, BECAUSE I THINK PAZ TOLD ME HE COULD SEE ME

JUST LIKE WITH HIS HANDS.

Q. AND YOU WERE HOPING THE POLICE WOULD SEE THE SHOTGUN?

A. I WAS HOPING THEY WOULD SEE AND MAKE SURE THEY DIDN'T MAKE NO ACTION, YES, SIR.

Q. WHY NOT JUST TELL THE POLICE ONCE YOU'VE BEEN PULLED OVER THAT YOU HAVE A SHOTGUN IN THE CAR? DOESN'T THAT MAKE MORE SENSE?

A. NO, BECAUSE IN THE PAST I'VE SEEN ABOUT ACCIDENTAL SHOOTINGS, "MAN ARMED. DANGEROUS."

Q. SIR, WAS IT POSSIBLE FOR YOU TO STOP YOUR CAR AND PUT YOUR HANDS OUT THE WINDOW?

MR. GULLEY: OBJECTION. ANYTHING IS POSSIBLE.

THE COURT: OVERRULED.

BY MR. LINK:

Q. YOU CAN ANSWER THAT QUESTION.

A. COULD YOU ASK ME THAT AGAIN?

Q. YES, SIR. ISN'T IT POSSIBLE TO HAVE STOPPED YOUR CAR AND JUST PUT YOUR HANDS OUT THE WINDOW?

A. YEAH, IT COULD HAVE HAPPENED.

Q. DOESN'T THAT SEEM LIKE A LOGICAL THING TO DO?

A. I WOULDN'T SAY LOGICAL.

Q. IT MADE MORE SENSE TO YOU TO THROW THE SHOTGUN OUT?

A. I WASN'T IN -- THE FIRST THING THAT CAME TO ME WAS LET THE OFFICERS KNOW THAT YOU'RE DISCHARGING THIS GUN FROM YOUR CAR.

Q. SO IT MADE MORE SENSE TO YOU TO THROW THE SHOTGUN OUT THE WINDOW?

A. THAT'S HOW I FELT.
Q. YOU WERE TRYING TO DISCARD EVIDENCE, WEREN'T YOU?
A. NO.
Q. YOU WERE HOPING THE POLICE WOULD NEVER FIND IT, WEREN'T YOU?
A. THEY WERE RIGHT BEHIND ME.
Q. BUT IT WAS NIGHTTIME?
A. WHEN I SAY RIGHT BEHIND ME, HE'LL TELL YOU, RIGHT BEHIND ME. I HEARD THE TESTIMONY YESTERDAY.
Q. WHY NOT JUST WAIT UNTIL THE POLICE GET TO YOUR WINDOW AND JUST HAND IT TO THEM?
MR. GULLEY: OBJECTION. ARGUMENTATIVE. ASKED AND ANSWERED.
THE COURT: SUSTAINED.
BY MR. LINK:
Q. YOU NEVER TOLD THE POLICE ABOUT YOUR CELL PHONE, CORRECT, OR THE CHECKS?
A. I CAN'T SAY. NO.
Q. EITHER YOU DID OR YOU DIDN'T.
A. NO, THIS IS WHAT I'LL TELL YOU. I DIDN'T TELL THE POLICE ABOUT IT. TO MYSELF I SAID, "SHE KNOWS SHE HAS IT," -- I USED ANOTHER TERM -- AND THEY WERE NO WHERE AROUND. AND THEY WEREN'T CLOSE ENOUGH FOR ME TO KNOW THAT. I WAS TALKING DIRECTLY TO -- EXCUSE ME -- I WAS UPSET ABOUT MY PHONE BEING MISSING, MY HOUSE BEING BROKEN INTO, MY DAUGHTER'S CLOTHES BEING STOLEN AND THE BIKE, AND THAT I HAD ASKED THEM TO BRING ME BACK -- TAKE ME BACK TO THEM BECAUSE I WAS TELLING THEM THEY WERE -- THEY WERE USING -- I'M TELLING THIS GUY THAT

THEY'RE USING DRUGS UP THERE.

MR. GULLEY: OBJECTION. NONRESPONSIVE.

THE COURT: SUSTAINED. STRICKEN.

BY MR. LINK:

Q. YOU SAID AT SOME POINT THAT MR. KNOX WAS YELLING AT YOU, CORRECT, WITH THE BASEBALL BAT, RIGHT? WE'RE TALKING ABOUT THE 12TH HERE.

A. YEAH, I'M STILL WITH YOU. I'M JUST -- YOU'RE KIND OF REENACTING IT. I'M JUST TRYING TO FOLLOW YOU. THAT'S ALL.

Q. IT'S YOUR TESTIMONY. YOU'RE THE ONE THAT SAID THAT AT SOME POINT CHRISTOPHER KNOX THREATENED YOU WITH A BASEBALL BAT?

A. YES.

Q. THAT NIGHT?

A. AND NIGHTS BEFORE THAT.

Q. WE'RE JUST TALKING ABOUT THIS NIGHT.

A. I KNOW. I'M JUST --

Q. I APPRECIATE YOUR HELP. BUT THIS PARTICULAR NIGHT HE THREATENED YOU WITH A BASEBALL BAT?

A. THAT PARTICULAR NIGHT HE THREATENED ME WITH A BASEBALL BAT.

Q. BECAUSE YOU CAME TO HIS HOUSE WITH A SHOTGUN, RIGHT?

A. WELL, I COULD SEE -- LIKE YOU SAID, YOU HAVE NEVER MET THE MAN. IT'S HARD TO ANSWER THAT, WHAT WAS HIS FRAME OF MIND.

Q. ISN'T IT TRUE THAT YOU TOOK THIS SHOTGUN RIGHT HERE

AND PLACED IT UP AGAINST JOSE CASTRO'S NECK AND YOU SHOVED HIM UP AGAINST THE WALL?

A. NO. TO ANSWER YOUR QUESTION BEFORE THAT, MR. KNOX KNEW I WOULDN'T USE THAT, AND NO I DIDN'T SHOVE MR. JOSE AGAINST THE WALL WITH THAT.

MR. LINK: NOTHING FURTHER.

THE COURT: ANY REDIRECT, MR. GULLEY?

REDIRECT EXAMINATION

BY MR. GULLEY:

Q. DID YOU EVER POINT THAT GUN AT ANYONE?

A. NEVER POINTED THAT GUN AT ANYTHING.

Q. DID YOU EVER PUSH ANYBODY DOWN WITH THAT GUN?

A. NEVER.

Q. AND THE REASON WHY YOU WAS UP THERE WITH THAT GUN WAS BECAUSE YOU WERE AFRAID THAT YOU MAY BE ATTACKED, CORRECT?

A. CORRECT.

Q. THE REASON YOU WENT UP THERE WAS TO GET YOUR STUFF BACK?

A. THAT'S ALL.

MR. GULLEY: THANK YOU. NOTHING FURTHER.

THE COURT: RECROSS?

RECROSS EXAMINATION

BY MR. LINK:

Q. AND YOU THOUGHT THE BEST WAY TO DO THAT WOULD BE TO BRING A SHOTGUN WITH YOU, CORRECT?

A. NO, THAT'S INCORRECT.

Q. IT'S NOT THE BEST WAY, RIGHT?

A. I DON'T KNOW. I JUST CAN'T JUST SEE GETTING NOTHING BACK AT GUNPOINT.
Q. BUT YOU BROUGHT A SHOTGUN WITH YOU TO GET YOUR STUFF BACK?
A. I DIDN'T WANT TO GET ANOTHER GASH IN MY HEAD.
Q. I'M SORRY?
A. I DIDN'T WANT TO GET ANOTHER GASH IN MY HEAD.
Q. YOU BROUGHT A SHOTGUN UP TO GET YOUR STUFF BACK? IT'S A SIMPLE QUESTION. YOU ALREADY ADMITTED --
A. DID I BRING A SHOTGUN IN ORDER TO GET MY STUFF BACK?
Q. YES.
A. NO, I BROUGHT A SHOTGUN TO MAKE SURE NOBODY WAS GOING TO HIT ME IN THE HEAD WITH A BAT.
Q. YOU THOUGHT THE BEST COURSE OF ACTION INSTEAD OF CALLING THE POLICE WAS TO CONFRONT YOUR UPSTAIRS NEIGHBOR WHILE HOLDING A SHOTGUN AT YOUR SIDE?
MR. GULLEY: OBJECTION. MISSTATES THE TESTIMONY.
THE COURT: OVERRULED.
THE WITNESS: YOU'RE GOING TO HAVE TO ASK ME THAT AGAIN BECAUSE THAT ONE RIGHT THERE IS REALLY TAKING ME. GO AHEAD.
BY MR. LINK:
Q. OKAY. I'M JUST GOING TO WALK YOU THROUGH IT.
A. I APPRECIATE IT.
Q. NO PROBLEM. AFTER YOUR PLACE WAS BROKEN INTO, YOU THOUGHT THE BEST COURSE OF ACTION INSTEAD OF CALLING THE POLICE WAS TO GO UPSTAIRS AND CONFRONT YOUR NEIGHBORS WITH A

SHOTGUN?

A. ARE YOU ASKING ME WHAT I THOUGHT, OR ARE YOU ASKING ME --

Q. NO, I'M ASKING WHAT YOU DID.

A. *WHAT I THOUGHT WAS TO BE THE BEST WAY* --

Q. WHAT YOU DID, NOT WHAT YOU THOUGHT.

A. WHAT I DID?

Q. YEAH.

A. WELL, THE WAY YOU'RE WORDING IT, I CAN'T ANSWER THAT HONESTLY.

MR. LINK: THAT'S FINE. NO FURTHER QUESTIONS.

THE COURT: MR. GULLEY?

MR. GULLEY: PERMISSION JUST TO GO BEYOND THE SCOPE QUICKLY, YOUR HONOR?

THE COURT: GO AHEAD.

REDIRECT EXAMINATION

BY MR. GULLEY:

Q. YOU GAVE YOUR SIZE AS 6 FOOT 1, 247 POUNDS?

A. 57.

Q. 57 POUNDS. YOU OBVIOUSLY CAN BEAT UP MR. CASTRO, CORRECT?

A. YES.

Q. WITH NO PROBLEMS?

A. NOT A PROBLEM.

Q. YOU DIDN'T NEED A *GUN* TO BEAT UP MR. CASTRO?

A. WOULDN'T THINK OF IT.

MR. GULLEY: ALL RIGHT. NOTHING FURTHER, YOUR HONOR.

THE COURT: MR. LINK?

MR. LINK: ONE SECOND, YOUR HONOR. THANK YOU. NOTHING FURTHER.

THE COURT: SIDEBAR PLEASE.

(SIDEBAR CONFERENCE, NOT REPORTED.)

THE COURT: ALL RIGHT. WE'RE GOING TO DO THIS, LADIES AND GENTLEMEN. THE ATTORNEYS AND I THINK -- WELL, MR. GULLEY, DO YOU HAVE ANY ADDITIONAL EVIDENCE TO PRESENT?

MR. GULLEY: NOT AT THIS TIME, YOUR HONOR.

THE COURT: DEFENSE RESTS?

MR. GULLEY: DEFENSE RESTS, YES.

THE COURT: YOU HAVE AN EXHIBIT, RIGHT?

MR. GULLEY: YES, YOUR HONOR, BUT I'M NOT INTRODUCING ANYTHING.

THE COURT: OKAY. ANY REBUTTAL EVIDENCE FROM THE PEOPLE?

MR. LINK: WHAT WAS YOUR EXHIBIT A?

MR. GULLEY: YES.

THE COURT: WE'LL TALK ABOUT IT DURING THE BREAK. IT WAS A HANDWRITTEN STATEMENT BY ONE OF THE WITNESSES.

MR. LINK: NO, I'LL HAVE NO REBUTTAL EVIDENCE.

THE COURT: ALL RIGHT. SO LADIES AND GENTLEMEN, AT THIS POINT ALL OF THE EVIDENCE THAT YOU HAVE HEARD IN THIS CASE IS IN. NOW, THAT DOESN'T MEAN THE TRIAL IS OVER. IT MEANS THAT THERE'S NOT GOING TO BE ANY ADDITIONAL EVIDENCE. THE NEXT STEP IS FOR THE ATTORNEYS AND THE COURT TO CONFER ON LEGAL INSTRUCTIONS, AND THEN FOR THE COURT TO READ THOSE LEGAL INSTRUCTIONS TO YOU.

NOW, IT'S GOING TO TAKE THE ATTORNEYS AND I A GOOD HALF AN HOUR, IF NOT A LITTLE BIT MORE, TO DISCUSS AND SETTLE ON THE INSTRUCTIONS. WE CAN'T DO THAT AHEAD OF TIME UNTIL ALL OF THE EVIDENCE IS IN BECAUSE WE DON'T KNOW WHICH INSTRUCTIONS ARE APPROPRIATE. SO YOU'RE GOING TO GET A BREAK AT THIS POINT UNTIL 11:30. THAT'S ALMOST 45 MINUTES. LEAVE YOUR NOTEBOOKS IN PLACE. PLEASE DON'T TALK ABOUT THE CASE NOR FORM OR EXPRESS ANY OPINIONS ABOUT IT. AND WE WILL BE READY TO PROCEED WITH LEGAL INSTRUCTIONS AT 11:30. HAVE A GOOD BREAK AND THEN WE'LL SEE YOU AT 11:30.

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT OUT OF THE PRESENCE OF THE JURY:)

THE COURT: THE JURY HAS EXITED. MR. GULLEY, DO YOU THINK YOUR CLIENT MIGHT WANT TO WAIVE HIS PRESENCE FOR OUR GOING OVER THE INSTRUCTIONS, OR DOES HE WANT TO BE HERE FOR THAT?

MR. GULLEY: HE PROBABLY WANTS TO WAIVE HIS PRESENCE.

THE COURT: YOU WANT TO BE HERE WHILE THE ATTORNEYS AND I INFORMALLY DISCUSS INSTRUCTIONS, OR DO YOU WANT TO JUST COME BACK AT 11:30?

THE DEFENDANT: WHAT DO YOU THINK WOULD BE BEST?

(COUNSEL AND THE DEFENDANT CONFER OFF THE RECORD.)

THE COURT: ALL RIGHT. HE'S WAIVED HIS PRESENCE. COUNSEL, WE'LL BE IN RECESS UNTIL 11, AND THEN WE'LL START WITH THE INSTRUCTIONS AT 11:00. WE'LL DO SO ON THE RECORD.

(RECESS.)

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT

OUT OF THE PRESENCE OF THE DEFENDANT:)

THE COURT: ON THE RECORD. THE DEFENDANT IS ABSENT. THE JURORS ARE ABSENT. BOTH COUNSEL AND THE COURT WILL GO OVER INSTRUCTIONS AT THIS TIME. GENTLEMEN, I WILL GO OVER THESE BY NUMBER. IF I SAY THE NUMBER, IF YOU WISH ME TO PAUSE JUST STOP ME.

MR. LINK: AND FOR THE RECORD, YOUR HONOR, I DID MY BEST TO TAYLOR THESE INSTRUCTIONS TO THIS PARTICULAR CASE, BUT SOME OF THEM ARE NOT.

THE COURT: RIGHT. OKAY. 1.00 IS OKAY. 1.01 IS OKAY. 1.02 IS OKAY. 1.03 IS OKAY. 1.05 IS OKAY.

1.20 I DON'T INTEND TO READ BECAUSE THE DEFINITION OF WILLFULLY IS CONTAINED ALREADY IN 9.00 WHICH IS THE DEFINITION OF ASSAULT.

MR. LINK: AGREED.

THE COURT: THANK YOU. 2.00 IS OKAY. 2.01 IS -- LET'S SEE, I THINK IN THIS CASE THE -- WOULD IT BE FAIR TO STATE THAT THE ONLY CIRCUMSTANTIAL EVIDENCE WOULD BE THE EVIDENCE OF THE DEFENDANT'S STATE OF MIND AT THE TIME HE ENTERED THE APARTMENT, AND, THEREFORE, THE USE OF 2.02, I THINK, WOULD BE APPROPRIATE RATHER THAN 2.01? I GUESS THE QUESTION IS, IS THERE ANY CIRCUMSTANTIAL EVIDENCE UPON WHICH THE PEOPLE ARE RELYING TO ESTABLISH ANY OF THE ELEMENTS OF THE OTHER COUNTS CHARGED, ASSAULT AND THE TWO GUN CHARGES?

MR. LINK: JUST THE FACT THAT HE GOT INTO HIS CAR AND SPED AWAY AND THREW THE SHOTGUN OUT THE WINDOW, THAT ALL GOES TO THE FACT THAT HE WAS TRYING TO GET AWAY FROM THE POLICE FOR A GREATER CRIME THAN JUST FELONY POSSESSION OF A

FIREARM.

THE COURT: OF COURSE THERE IS A SPECIFIC INSTRUCTION THAT APPLIES TO THAT, FLIGHT AFTER CRIME, WHICH I'M NOT SURE IS IN HERE OR NOT. BUT I CAN'T GIVE 2.01 AND 2.02, AND THAT'S STATED IN THE USE NOTES AFTER BOTH OF THOSE. AND I REALLY THINK WHAT I NEED TO GIVE HERE IS 2.02 RATHER THAN 2.01. THE FLIGHT AFTER THE CRIME IS, AS I SAID IS -- MAYBE IT'S 2.5 SOMETHING THAT SPECIFICALLY SPEAKS TO THAT. AND YOU'RE ENTITLED TO THAT INSTRUCTION, BUT I DON'T THINK IT APPLIES. YOU KNOW, IT WOULDN'T BE REASON TO GIVE 2.01.

MR. LINK: THAT'S FINE, YOUR HONOR.

THE COURT: NOW, IF YOU WOULD GO AHEAD AND GET 3.31, BECAUSE 3.31 NEEDS TO BE GIVEN IMMEDIATELY PRIOR TO 2.02.

MR. LINK: OKAY.

THE COURT: AND 3.31 IS GOING TO READ AS FOLLOWS: "IN THE CRIME CHARGED IN COUNT 1" -- AND I SHOULD SAY "BURGLARY" -- "THERE MUST EXIST A UNION OR JOINT OPERATION OF ACT OR CONDUCT AND A CERTAIN SPECIFIC INTENT IN THE MIND OF THE PERPETRATOR. UNLESS THIS SPECIFIC INTENT EXISTS, THE CRIME TO WHICH IT RELATES IS NOT COMMITTED." AND THEN I'M GOING TO DELETE THE NEXT SENTENCE AND DEFINE THAT SPECIFIC INTENT NOW, AND IT WILL READ AS FOLLOWS: "THE CRIME OF BURGLARY REQUIRES THE SPECIFIC INTENT TO COMMIT A FELONY INSIDE A STRUCTURE UPON ENTERING IT." THAT'S THE WAY I WORDED IT JUST SO THEY KNOW WHAT WE'RE TALKING ABOUT AT THAT POINT.

MR. LINK: DO YOU WANT ME TO GET THAT BECAUSE 3.31

IS IN NUMERICAL ORDER IN THE PACKET.

THE COURT: YOU NEED TO PULL 3.31 OUT AND PUT IT WHERE WE ARE RIGHT NOW BECAUSE I'M GOING TO READ 3.31 IMMEDIATELY AFTER 2.00, COUNSEL. AND I'M GOING TO READ IT AS I'VE INDICATED, THE CHANGE BEING, "THE CRIME OF BURGLARY REQUIRES THE SPECIFIC INTENT TO COMMIT A FELONY INSIDE A STRUCTURE UPON ENTERING."

SO AFTER 3.31 WILL BE 2.02. NOW I AM USING ONLY THE PHRASE "SPECIFIC INTENT," AND NOT "MENTAL STATE" ON THIS INSTRUCTION. I'VE DELETED "MENTAL STATE." I THINK THEY'RE TALKING IN MENTAL STATE ABOUT THINGS OTHER THAN WHAT WE ARE DOING WITH HERE. DO YOU HAVE ANY OBJECTION TO THAT, MR. LINK?

MR. LINK: NO.

THE COURT: AND ALSO, THERE'S ONLY ONE SPECIFIC INTENT CRIME IN THIS CASE, THAT BEING BURGLARY, AGREED?

MR. LINK: AGREED.

THE COURT: MR. GULLEY?

MR. GULLEY: YES.

THE COURT: THEREFORE, IN PARAGRAPH ONE OF 2.02, STARTING WITH THE THIRD WORD, I THINK ON THE FIFTH LINE DOWN IT SAYS, "FURTHER YOU MAY NOT FIND THE DEFENDANT GUILTY," THAT OBVIOUSLY WAS TAILORED IN A CASE IN WHICH THERE WERE TWO SPECIFIC INTENT CRIMES BECAUSE IT SIMPLY REPEATS WHAT HAS BEEN SAID IN THE PREVIOUS FIVE LINES. SO THE SENTENCE STARTING WITH THE WORD "FURTHER" ON LINE 5 IS BEING DELETED IN IT'S ENTIRETY. YOU KNOW WHAT I'M SAYING? IT JUST REPEATS THE SAME THING THAT'S ALREADY BEEN SAID.

MR. LINK: YES.

THE COURT: SO I'M DELETING "MENTAL STATE." I'M DELETING THE SENTENCE STARTING WITH THE WORD "FURTHER," AND EVERYTHING ELSE WILL BE READ AS SUBMITTED IN 2.02.

AND 2.01, IF I HAVEN'T SAID SO ALREADY, IS DELETED, IS NOT GOING TO BE READ. 2.02 IS.

2.03, CONSCIOUSNESS OF GUILT, IS NEXT, AND THAT'S OKAY. 2.09. I DON'T THINK WE HAD ANY EVIDENCE LIMITED TO A PURPOSE. NOW, THEY CAN ONLY CONSIDER THIS FELONY CONVICTION FOR CERTAIN THINGS, BUT I DIDN'T INSTRUCT THEM ON THAT AT THE TIME IT WAS STATED TO THEM, SO I'M GOING TO DELETE 2.09.

2.11 IS OKAY.

ON THE POLICE REPORT INSTRUCTION, I'VE DELETED THE WORD "POLICE" AND PUT IN "WITNESS" BECAUSE WE HAD EVIDENCE REGARDING BOTH WITNESS AND POLICE REPORTS, AND I DELETED THE WORDS "LAW ENFORCEMENT" ON LINE 2.

MR. LINK: OKAY.

THE COURT: OTHERWISE, I THINK IT'S OKAY.

MR. LINK: I BELIEVE -- WELL, AREN'T THOSE HANDWRITTEN STATEMENTS BY WITNESSES ADMISSABLE, BECAUSE THE ONE THAT DEFENSE MARKED WAS -- I DON'T KNOW IF HE'S PUT IT IN --

MR. GULLEY: NO, I DIDN'T.

MR. LINK: AT SOME POINT, I ENTERED WITNESS -- HANDWRITTEN WITNESS STATEMENTS BECAUSE THEY'RE TECHNICALLY NOT POLICE REPORTS. THAT'S THE ONLY REASON.

THE COURT: WELL, THEY'RE STILL HEARSAY, THOUGH. I ALLOWED, AND THERE WAS NO OBJECTION, AND THAT'S ENTIRELY

PROPER FOR CERTAIN PASSAGES IN THESE WITNESS REPORTS TO BE READ TO THE JURY. BUT THE ENTIRE WITNESS REPORT ITSELF AS A DOCUMENT IS INADMISSABLE HEARSAY. AND ALTHOUGH IT WAS MARKED AS EXHIBIT A, I MADE A MENTAL NOTE TO MYSELF THAT WHEN MR. GULLEY MARKED IT I WASN'T GOING TO LET IT IN.

MR. LINK: SO SAY "WITNESS REPORTS"?

THE COURT: YEAH, "WITNESS REPORTS."

MR. LINK: OKAY.

THE COURT: AND THAT INCLUDES THE POLICE REPORTS AS WELL AS THE CIVILIAN WITNESS REPORTS.

MR. GULLEY: THE ONLY PROBLEM I SEE WITH THAT, YOUR HONOR, IS THE 911 IS COMING IN.

THE COURT: IT'S NOT A WITNESS REPORT. AND, YOU KNOW, THAT'S ADMISSABLE AS AN EXCEPTION TO THE HEARSAY. IT'S NOT REALLY A WITNESS REPORT. IT'S A 911 TRANSCRIPT. SO I DON'T SEE A PROBLEM WITH THAT.

MR. GULLEY: THAT'S FINE.

THE COURT: NEXT IS 2.13. THAT'S OKAY.

ON 2.20, THE FIRST BRACKETED SENTENCE IS A REPEAT OF THE PRECEDING INSTRUCTION, 2.13, AND THEREFORE I'M GOING TO DELETE THAT. IT'S JUST SIMPLY A REPEAT OF 2.13, A STATEMENT PREVIOUSLY MADE BY THE WITNESS THAT IS CONSISTENT OR INCONSISTENT. SO THAT WON'T BE READ.

CHARACTER FOR HONESTY OR TRUTHFULNESS, DELETED. THERE WAS NONE. ADMISSION BY THE WITNESS OF UNTRUTHFULNESS. I DON'T BELIEVE THERE WERE ANY.

MR. LINK: AGREED.

THE COURT: MR. GULLEY?

MR. GULLEY: YES, YOUR HONOR.

THE COURT: DELETED.

WITNESS'S PRIOR CONVICTION OF A FELONY IS IN. PAST CRIMINAL CONDUCT AMOUNTING TO A MISDEMEANOR IS OUT, AND THE SECOND PAGE IS OUT AS WELL.

2.21.1, DISCREPANCIES IN TESTIMONY, THAT'S OKAY. 2.21.2 IS OKAY. 2.22, OKAY. 2.24 IS OUT. 2.27 IS IN.

NOW, WE TALKED A LITTLE BIT ABOUT GOOD CHARACTER EVIDENCE OF THE DEFENDANT, AND I ACKNOWLEDGED THAT THAT AREA WAS TOUCHED UPON IN CROSS-EXAMINATION BY THE DEFENSE ATTORNEY OF CERTAIN PROSECUTION WITNESSES, BUT WE -- IT WASN'T FORMALLY INTRODUCED AS GOOD CHARACTER EVIDENCE, AND I SEE NO NEED OR REASON TO READ 2.40 OR 2.42.

MR. LINK: AGREED.

THE COURT: AND THOSE WOULD BE DELETED.

2.50, THERE WAS NO OTHER CRIMES EVIDENCE THAT WAS INTRODUCED FOR PURPOSES OF MOTIVE OR STATE, ANYTHING LIKE THAT. SO 2.50, I DON'T BELIEVE, IS APPROPRIATE. DO EITHER ONE OF YOU WANT TO HESITATE ON THAT FOR A MOMENT?

MR. GULLEY: THE ONLY THING I WAS THINKING, YOUR HONOR, WAS THE PEOPLE TRIED TO TOUCH UPON BEING UNDER THE INFLUENCE OF ALCOHOL, AND, AGAIN, HE GAVE HIS BLOOD ALCOHOL LEVEL.

THE COURT: WELL, THAT WAS -- YOU KNOW, WE HAD SOME EVIDENCE THAT HE -- THAT HE HAD SOME BEER AND MAY HAVE BEEN UNDER THE INFLUENCE. BUT IT HAS NOTHING TO DO WITH OTHER CRIMES, I DON'T BELIEVE, UNDER 2.50. SO THAT'S REALLY JUST CHARACTER EVIDENCE TO PROVE THAT HE COMMITTED CERTAIN CRIMES.

BUT IT DOESN'T APPLY TO THE DUI.

MR. GULLEY: THAT'S FINE.

THE COURT: 2.60 IS OUT. 2.61 IS OUT. 2.62 IS GOING TO BE OUT. 2.71 IS IN. 2.72 IS IN.

NOW, YOU HAD MENTIONED SOMETHING ABOUT FLIGHT AFTER CRIME, MR. LINK, AND I NOTE THAT THERE IS NO INSTRUCTION IN THAT REGARD THAT'S BEEN SUBMITTED. ARE YOU REQUESTING THAT ONE?

MR. LINK: YES, YOUR HONOR.

THE COURT: IT'S 2.52. AND, JANET, ARE YOU SET UP TO PRODUCE AN INSTRUCTION FOR US, 2.52? IF NOT, WE'LL GIVE THAT TASK TO MR. LINK OVER THE LUNCH HOUR.

DO YOU KNOW WHICH ONE I'M TALKING ABOUT, MR. GULLEY?

MR. GULLEY: I DO, YOUR HONOR. WE'LL ARGUE AGAINST IT. I DON'T THINK WHAT HAPPENED WAS SUFFICIENT WITH FLIGHT.

THE COURT: I THINK IT DIRECTLY APPLIES. I MEAN, THE -- CERTAIN EVENTS OCCURRED, AND HE JUMPED IN HIS CAR AND TOOK OFF, AND THOSE EVENTS HAVE BEEN ALLEGED TO BE CRIMES. SO 2.52 WILL BE READ OVER THE OBJECTION OF THE DEFENSE.

AND IN THE INSTRUCTION THERE ARE VARIOUS ALTERNATIVES IN THIS, SUCH AS FLIGHT, ATTEMPTED FLIGHT, ESCAPE, ETC. AND IN THIS CASE, I'M SIMPLY GOING TO READ FLIGHT, "THE FLIGHT OF A PERSON IMMEDIATELY AFTER THE COMMISSION OF A CRIME OR AFTER ACCUSED OF A CRIME, IS NOT SUFFICIENT IN ITSELF." OTHERWISE, THAT ONE WILL BE READ IN IT'S ENTIRETY VERBATIM.

2.90 WILL BE NEXT. 3.30 WILL BE NEXT AFTER THAT, AND THAT WILL APPLY TO COUNTS 2, 3, AND 4, AND ALSO STATE.

3.31.5 IS OUT.

4.71, DO YOU REALLY WANT THAT?

MR. LINK: WHICH ONE?

THE COURT: 4.71, EXACT TIME OF CRIME.

MR. LINK: I'D LIKE IT IN JUST BECAUSE.

THE COURT: OKAY. YOU GOT IT.

14.50, BURGLARY DEFINED. IT LOOKS OKAY TO ME.

AFTER 14.50 WILL BE 14.51. NEXT 14.52. NEXT 14 -- I'M SORRY -- NEXT WILL BE 9.02 ASSAULT WITH A DEADLY WEAPON. AND THAT'S OKAY.

NEXT IS THE DEFINITION OF SIMPLE ASSAULT, WHICH IS NECESSARY AND IS OKAY AS PRESENTED, WHICH GIVES RISE TO THE LESSER AND NECESSARILY LESSER INCLUDED OFFENSE OF SIMPLE ASSAULT, AND WHETHER OR NOT THE EVIDENCE WOULD REQUIRE THE COURT TO GIVE THAT LIO. ACTUALLY, SIMPLE ASSAULT IS, OF COURSE, A NECESSARY LIO OF ANY GREATER ASSAULT CHARGE SUCH AS WE HAVE HERE. I BELIEVE I'M OBLIGED TO GIVE SIMPLE ASSAULT AS AN LIO, AND I WOULD TENTATIVELY INTEND TO DO SO SUBJECT TO HEARING FROM EITHER COUNSEL.

MR. LINK: YEAH. THE ONLY COMMENT I HAVE, YOUR HONOR, IS I THINK DEFENSE IS CONTENDING THAT EITHER ASSAULT WITH A DEADLY WEAPON HAPPENED OR IT DIDN'T. I DON'T THINK THERE'S ANY LESSER INCLUDED OFFENSE OF JUST STRAIGHT ASSAULT. IT'S EITHER ONE OR THE OTHER. I DON'T THINK THE DEFENSE IS CONTENDING ANYTHING ELSE.

THE COURT: WELL, THERE IS EVIDENCE, THOUGH, OF THE -- DOWN ON THE GROUND FLOOR KIND OF WAVING THE RIFLE TOWARDS THE PEOPLE ON THE BALCONY. THAT MIGHT BE CONSIDERED, I SUPPOSE, SIMPLE ASSAULT, IF HE WASN'T AIMING AT ANYONE. AND, YOU KNOW, IT'S HARD TO COME UP WITH ANY SITUATION IN WHICH A GREATER ASSAULT HAS BEEN ALLEGED AND THERE'S EVIDENCE OF IT IN WHICH I DON'T HAVE TO GIVE THE LESSER OFFENSE CHARGE. I SEE WHAT YOU'RE SAYING. I MEAN, THE MAIN ASSAULT IN THIS CASE IS THE ONE THAT OCCURS WITH THE WEAPON.

MR. LINK: IT WILL ONLY SERVE TO CONFUSE THE JURY, YOUR HONOR.

THE COURT: BUT NOT GIVING IT WILL ALSO QUITE LIKELY SERVE TO HAVE THE CASE REVERSED UNFORTUNATELY.

MR. LINK: AND THAT WILL BE BAD.

THE COURT: AND I'M VERY SENSITIVE ABOUT THAT.

THE COURT: LET ME JUST THINK THIS THROUGH. WHAT DO YOU THINK, MR. GULLEY?

MR. GULLEY: YOUR HONOR, I THINK YOU SHOULD GIVE IT. BUT IN TERMS OF TALKING ABOUT LESSER RELATED, I GUESS THE INSTRUCTION --

THE COURT: OFF THE RECORD FOR A SECOND.

(BRIEF DISCUSSION OFF THE RECORD.)

THE COURT: 9.00.01 IS OKAY. ANY OBJECTION, MR. GULLEY?

MR. GULLEY: NO, YOUR HONOR.

THE COURT: OKAY. 9.01 IS OKAY REGARDING PRESENT ABILITY. AND 12.44 IS NEXT. I'M NOT INTIMATELY FAMILIAR WITH THIS ONE, SO LET ME READ THROUGH IT. OKAY. THAT LOOKS TO BE OKAY.

NEXT IS 12.40.

MR. LINK: AND I TRIMMED THAT ONE UP SO.

THE COURT: AND IT DEFINES A SHORT-BARRELED SHOTGUN

AS BEING ONE THAT HAS A BARREL OF LESS THAN 18 INCHES IN LENGTH OR IN OVERALL LENGTH OF LESS THAN 26 INCHES. I BELIEVE THAT'S WHAT THE LAW SAYS. MR. GULLEY, ANY OBJECTION TO THAT AS IT'S READ?

MR. GULLEY: NO.

THE COURT: OKAY.

MR. LINK: I THINK I MAY HAVE MISSED AN ELEMENT, THOUGH.

THE COURT: NO, THE ELEMENT ABOUT -- WELL, WHICH ONE?

MR. LINK: WELL, ON THE FIRST ONE, POSSESSION OF A PERSON CONVICTED, THERE'S TWO ELEMENTS. AND THE SECOND ELEMENT ON 12. -- SEE WHAT I'M SAYING -- A PERSON POSSESSED A SHORT-BARRELED SHOTGUN, AND THE SAME WITH ELEMENT ONE ON 12.44, THE DEFENDANT HAD A POSSESSION OF A SHOTGUN. THEN THERE'S A SECOND ELEMENT THAT THE DEFENDANT HAD KNOWLEDGE OF THE PRESENCE OF A SHOTGUN, AND 12.40 DOESN'T SEEM TO HAVE THAT ELEMENT. BUT I JUST DON'T WANT TO SKIP AN ELEMENT.

MR. GULLEY: SO I THINK IT SHOULD HAVE SAID --

THE COURT: OFF THE RECORD ON THIS ONE FOR A MOMENT.

(BRIEF DISCUSSION OFF THE RECORD.)

THE COURT: BACK ON THE RECORD. 12.40 APPEARS TO BE -- IT'S NOT -- THE ELEMENTS ARE NOT AN EXACT STATEMENT OF WHAT'S IN CALJIC, THOUGH. THE ELEMENTS IN CALJIC ON 12.40 ARE TWO-FOLD, AND THEY ARE AS FOLLOWS: NUMBER 1, A PERSON POSSESSED ANY --

MR. LINK: SHORT-BARRELED SHOTGUN.

THE COURT: SHORT-BARRELED SHOTGUN, I SUPPOSE, AND, THEN, NUMBER 2, THE INSTRUMENT WAS OF THE KIND COMMONLY KNOWN AS A SHORT-BARRELED SHOTGUN. THAT SEEMS TO PUT THE -- SO YOU'VE JUST INDICATED THE ELEMENT TO BE A PERSON POSSESSED A SHORT-BARRELED SHOTGUN AFTER HAVING DEFINED IT EARLIER IN THAT INSTRUCTION. I BELIEVE THAT'S OKAY.

MR. GULLEY, ANY OBJECTION?

MR. GULLEY: NO, YOUR HONOR.

THE COURT: ALL RIGHT. NOW, THE ONLY ALLEGATION THAT NEEDS TO BE DEFINED IS 12022.5 IN THIS CASE. LET'S SEE.

MR. LINK: THERE'S THE INHABITED DWELLING WHERE WE HAVE DURING THE BURGLARY.

THE COURT: RIGHT.

MR. LINK: AND THERE'S ALSO ANOTHER ALLEGATION OF ANOTHER PERSON IN THE RESIDENT WHEN THE BURGLARY TOOK PLACE.

MR. GULLEY: THE HOT PROWL ALLEGATION.

MR. LINK: YEAH.

THE COURT: WHAT'S THE AFFECTS OF THEIR BEING ANOTHER PERSON IN THE RESIDENCE?

MR. GULLEY: IT MAKES IT A VIOLENT FELONY.

THE COURT: IT MAKES IT A VIOLENT FELONY?

MR. GULLEY: YES.

THE COURT: SO ARE YOU SAYING THAT -- IS THERE A CALJIC FOR THAT, OR IS THAT SOMETHING FOR THE JURY TO DECIDE?

MR. GULLEY: I DON'T THINK THERE'S A CALJIC BECAUSE IT'S SO NEW.

MR. LINK: IT'S IN THE VERDICT FORM.

THE COURT: OKAY. ACTUALLY, I DON'T THINK IT NEEDS

AN INSTRUCTION IF IT'S IN THE VERDICT FORM. THEY EITHER FIND OR THEY DON'T FIND THAT DURING THE BURGLARY THERE WAS ANOTHER PERSON IN THE RESIDENCE. WOULDN'T YOU AGREE, MR. GULLEY?

MR. GULLEY: I'LL SUBMIT ON THAT.

THE COURT: OKAY. SO 17.19 IS OKAY.

AT THIS POINT, I'LL CEASE READING THE INSTRUCTIONS AND WE'LL GO INTO ARGUMENT. THAT WON'T BE UNTIL 1:30 OR SO. AND THEN AS FAR AS THE CONCLUDING INSTRUCTIONS GO, I'M GOING TO PULL OUT 17.32, AND THE REST OF THEM LOOK OKAY.

I'M GOING TO NEED 17.12, I THINK IT IS, REGARDING THE LIO. SO YOU'LL NEED, IF YOU WOULD, MR. LINK, WOULD YOU PROVIDE THE COURT WITH 17.12?

ACTUALLY, JANET, CAN YOU DO 17.12. PULL THAT ONE OUT FOR ME, PLEASE.

MR. LINK: SO YOU DON'T NEED 17.12?

THE COURT: NO, I'LL HAVE HER DO IT. OFF THE RECORD.

(BRIEF DISCUSSION OFF THE RECORD.)

THE COURT: I'VE ASKED THE PEOPLE TO PROVIDE A VERDICT FORM FOR PC240 AS A LESSER INCLUDED OFFENSE, AND I BELIEVE THAT THE ASSAULT CHARGE IS THE ONLY ONE FOR WHICH WE HAVE LIO ISSUES.

MR. GULLEY: YOUR HONOR, I THINK IT'S ARGUABLE THAT A 417.2 IS A LESSER, EXHIBITING THE FIREARM.

THE COURT: TO ASSAULT WITH A FIREARM?

MR. GULLEY: YES, BECAUSE THERE IS TESTIMONY, PARTICULARLY FROM MS. TALVERA, THAT THE DEFENDANT IS WALKING DOWN THE STEPS AND THEN CONTINUED TO YELL -- HE RAISED THE

FIREARM UP IN THE AIR.

MR. LINK: I, OF COURSE, DISAGREE, YOUR HONOR.

THE COURT: GIVE ME A MOMENT ON THAT ONE. OKAY. I DON'T FIND THAT THE 417 IS A NECESSARILY INCLUDED LIO OF ASSAULT WITH A FIREARM. I'M REVIEWING A MAIN SOURCE, WHICH IS THE CRIMINAL JURY INSTRUCTION'S HANDBOOK, AND IT SHOWS THE ONLY NECESSARILY INCLUDED LIO OF THE CHARGED CRIME IN THIS CASE TO BE SIMPLE ASSAULT.

MR. GULLEY: CORRECT. AND I'M ARGUING IT'S A LESSER RELATED THAN THIS ONE.

THE COURT: WELL, AS A LESSER RELATED, I BELIEVE THAT THE STATE OF THE LAW IS THAT IT CAN BE GIVEN ONLY UPON STIPULATION ON BOTH SIDES, AND IT DOESN'T SOUNDS LIKE MR. LINK IS IN A STIPULATING MOOD.

MR. LINK: NO, YOUR HONOR.

THE COURT: IS THAT CORRECT?

MR. LINK: THAT'S CORRECT.

THE COURT: SO I WON'T BE GIVING IT AS A LESSER RELATED ABSENT SOME STIPULATION.

MR. GULLEY, ARE THERE ANY OTHER ADDITIONS, DELETIONS, OR OBJECTIONS THAT THE DEFENSE MAY HAVE?

MR. GULLEY: YES, YOUR HONOR. THERE IS SOME ARGUMENT THAT 12.50, USE OF A FIREARM BY A CONVICTED FELON SELF-DEFENSE, MAY BE APPLICABLE IN LIGHT OF HIS TESTIMONY.

THE COURT: DO YOU HAVE A COPY OF IT?

MR. GULLEY: I JUST HAVE A PRINTOUT.

THE COURT: I'VE GOT THE BOOK. GIVE THE COPY TO DAN, PLEASE.

THE COURT: YOU HAVE A COPY OF IT, ALSO?

MR. LINK: I'M LOOKING AT THE BOOK, YEAH.

THE COURT: OKAY. LET'S GO OFF THE RECORD AND LET ME REVIEW THAT ONE.

(BRIEF DISCUSSION OFF THE RECORD.)

THE COURT: OKAY. BACK ON THE RECORD. 12.50 ENTITLED "USE OF A FIREARM BY A CONVICTED FELON SELF-DEFENSE" IS IN THE COURT'S VIEW DESIGNED FOR AND RESTRICTED TO THOSE SITUATIONS IN WHICH A PERSON FINDS HIMSELF IN A SITUATION WITHOUT ANY PRE-PLANNING, AND A FIREARM IS EITHER CLOSE AT HAND OR IMMEDIATELY GIVEN TO HIM FOR PURPOSES OF SELF-DEFENSE, AND HE THEREFORE POSSESS IT UNDER THOSE SPONTANEOUS CIRCUMSTANCES.

IN THE INSTANT CASE, THE EVIDENCE WAS THAT THE DEFENDANT HAD POSSESSED THE FIREARMS FOR, I THINK HE SAID, TWO TO THREE MONTHS THAT THEY'VE BEEN IN HIS HOUSE, AND THAT'S SIMPLY -- AND THAT HE HAD TO UNLOCK A BOX TO GET TO THEM, THIS DOES NOT APPEAR TO THE COURT TO BE A SITUATION WHICH 12.50 WOULD BE APPLICABLE BECAUSE IT WAS NOT A SPONTANEOUS QUICK MOVING SITUATION WHERE HE WAS TOSSED A GUN TO DEFEND HIMSELF BY SOMEBODY, WHICH I THINK IS WHAT IS REQUIRED HERE.

SO MR. GULLEY, I WILL DECLINE TO READ 12.50 AS REQUESTED BY THE DEFENSE AND OVERRULE YOUR OBJECTION.

MR. GULLEY: YOUR HONOR, CAN WE REVISIT 16 -- I MEAN, THE LESSER RELATED? MY ARGUMENT --

THE COURT: HOLD ON. 16 WHAT?

MR. GULLEY: I'M SORRY. I JUST WANT TO GO BACK TO THE 417 ISSUE.

THE COURT: 417, OKAY.

MR. GULLEY: MY ARGUMENT WOULD BE GIVEN THE FACTS OF THIS CASE, AND WHAT THE TESTIMONY WAS, AND HOW IT WENT DOWN, I THINK IT IS ARGUABLE THAT THIS IS A LESSER INCLUDED CRIME IN LIGHT OF THE FACT THAT HE DID SAY THAT HE WENT UP THERE, HE EXHIBITED THE SHOTGUN BUT HE NEVER POINTED IT AT ANYONE, WHICH WOULD TAKE IT OUT OF THE ASSAULT AND BRING IT DOWN TO THIS 417. AND I THINK THE JURY SHOULD BE ENTITLED TO THIS BECAUSE THAT'S THE WAY THE EVIDENCE ACTUALLY CAME OUT BASED ON THE DEFENDANT'S TESTIMONY, BUT ALSO ON MS. TALVERA'S TESTIMONY.

THE COURT: WHO KNOWS THE TEXT OR DEFINITION FOR WHAT IS AND WHAT IS NOT A NECESSARILY INCLUDED LESSER OFFENSE? IT HAS TO DO WITH WHETHER THERE ARE ELEMENTS IN THE ONE OFFENSE THAT WERE ALSO IN THE OTHER OFFENSE. WE ALREADY HAVE A LESSER INCLUDED OFFENSE OF SIMPLE ASSAULT. IF I WERE TO AGREE FOR THE MOMENT THAT 417 UNDER THE CIRCUMSTANCES OF THIS CASE MAY BE YET ANOTHER LESSER INCLUDED OFFENSE OF THE CHARGED CRIME, I KNOW THAT SIMPLE ASSAULT IS A LESSER INCLUDED OFFENSE. I'M NOT SURE THE 417 IS. BUT THEY'RE BOTH MISDEMEANORS, AND THEY'RE BOTH LESSER TO THE CHARGED CRIME. HOW IS THE DEFENDANT PREJUDICED IF I GIVE SIMPLE ASSAULT AS OPPOSED TO 417 RATHER THAN 417 AS OPPOSED TO SIMPLE ASSAULT?

MR. GULLEY: BECAUSE I --

THE COURT: LET'S SEE WHAT THE PENALTIES ARE FOR BOTH FIRST OF ALL.

MR. GULLEY: THEY'RE BOTH MISDEMEANORS, I THINK, IS MANDATORY 90 DAYS UNDER THE 417.

THE COURT: SEE, THAT'S THE PROBLEM. I MEAN, THAT'S -- I'M NOT CONVINCED THAT 417 IS AN LIO OF THE CHARGED CRIME, AND PC240 IS 6 MONTHS AND $1,000, AND 417 IS 6 MONTHS AND A THOUSAND DOLLARS BUT CARRIES WITH IT A MINIMUM OF 30 DAYS. I THINK THE 240 IS LESSER THAN THE 417. IF THEY WANT TO GIVE HIM A LESSER OFFENSE, THEY HAVE THE OPPORTUNITY OF DOING SO WITH THE 2. -- WITH THE 240. I'M NOT INCLINED TO GIVE BOTH THE 240 AND THE 417, AND I'M NOT CONVINCED THAT THE 417 IS A LESSER INCLUDED OFFENSE TO ASSAULT WITH A DEADLY WEAPON.

MR. GULLEY: WELL, STANDING IN AND OF ITSELF, YOUR HONOR, I AGREE. BUT GIVEN THE FACTS OF THIS CASE AND THIS PARTICULAR CIRCUMSTANCE, I THINK 417 IS MORE APPROPRIATE AND IT IS A LESSER INCLUDED GIVEN THE FACTS THAT WERE PRESENTED IN THIS CASE. THAT'S WHY I'M ASKING FOR IT.

THE COURT: MR. LINK, YOU WANT TO WEIGH IN ON THIS?

MR. LINK: I AGREE WITH YOUR HONOR'S COMMENTS. I'M NOT GOING TO STIPULATE, AS YOU SAID, TO A LESSER RELATED OFFENSE, AND I THINK ASSAULT GETS THE JOB DONE AS FAR AS LESSER INCLUDED OFFENSE. I DON'T THINK -- I DON'T THINK IT COMES IN, PERIOD. AND I DON'T THINK THE ELEMENTS EVEN MATCH UP ENOUGH. I THINK ONE IS SEPARATE. THERE'S TWO SETS OF NUMBERS HERE, 1, 2, AND 3, AND THEN 1 AND 2. AND THE FIRST SET OF NUMBERS, 1, 2, AND 3, 3 THE PERSON WAS NOT ACTING IN LAWFUL SELF-DEFENSE. I THINK THAT TAKES IT OUT OF THE RUNNING. AND THEN IN THE SECOND SET OF NUMBERS, THE VIOLATION OCCURRED IN A PUBLIC PLACE. THAT'S NOT AN ELEMENT. AND I AGREE, IF I STIPULATED TO IT, IT WOULD APPLY. BUT AS

YOUR HONOR POINTED OUT, I'M NOT INCLINED TO DO THAT AT THIS POINT.

THE COURT: OKAY.

MR. GULLEY: WELL, I WOULD JUST POINT OUT THIS IS TWO DIFFERENT CODE SECTIONS. THAT'S WHY THERE IS TWO DIFFERENT SETS OF ELEMENTS.

THE COURT: I THINK WHAT IT COMES DOWN TO IS THIS, MR. GULLEY, AND I'LL STATE FOR THE RECORD MY REASON. I THINK THAT YOU CAN COMMIT A 245(A)(2) WITHOUT ALSO COMMITTING A 417(A)(1). FOR EXAMPLE, YOU CAN BE 500 YARDS AWAY FROM A PERSON, SHOOT THE GUN TOWARDS THEM, NEARLY MISS THEM WITH A HIGH-POWERED RIFLE, AND BE GUILTY OF A 245(A)(2). BUT IN SO DOING, YOU'RE CERTAINLY NOT GUILTY OF A 417. AND BECAUSE YOU CAN COMMIT A 245(A)(2) WITHOUT ALSO COMMITTING A 417, I DON'T BELIEVE IT'S A NECESSARILY INCLUDED LESSER OFFENSE, AND, THEREFORE, WILL NOT READ IT AS SUCH EVEN THOUGH REQUESTED BY THE DEFENSE. AND ALSO FOR THE, I THINK, VERY SOUND REASONING THAT WE ALSO HAVE A LESSER INCLUDED OFFENSE OF 240. SO THE JURY HAS THAT OPTION. SO IT WILL NOT BE READ AS A LESSER INCLUDED OFFENSE, AND NOT AGREED TO BY THE PROSECUTION AS A LESSER RELATED OFFENSE.

WHAT ELSE? MR. LINK, ANYTHING ELSE FROM YOUR STANDPOINT?

MR. LINK: NO, YOUR HONOR.

THE COURT: ANYTHING FURTHER FROM THE DEFENSE, MR. GULLEY?

MR. GULLEY: NO, YOUR HONOR.

THE COURT: MIKE, LETS GET THE DEFENDANT IN HERE

AND I'LL READ THE INSTRUCTIONS, PLEASE.

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT IN THE PRESENCE OF THE DEFENDANT:)

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT IN THE PRESENCE OF THE JURY:)

THE COURT: WE'RE BACK ON THE RECORD IN PEOPLE VERSUS CUNNINGHAM. BOTH ATTORNEYS AND THE DEFENDANT ARE PRESENT. ALL 14 JURORS ARE PRESENT.

"MEMBERS OF THE JURY, YOU HAVE NOW HEARD ALL THE EVIDENCE IN THE CASE, AND IT IS MY DUTY TO INSTRUCT YOU ON THE LAW THAT APPLIES IN THE CASE. I'M REQUIRED BY LAW TO READ YOU THESE INSTRUCTIONS. I WILL TELL YOU RIGHT NOW IT'S GOING TO TAKE A GOOD 23 MINUTES TO READ THESE INSTRUCTIONS. HOWEVER, YOU WILL HAVE THESE INSTRUCTIONS IN WRITTEN FORM IN THE JURY ROOM TO REFER TO DURING YOUR DELIBERATIONS. SO YOU MAY OR MAY NOT FIND IT NECESSARY TO TAKE NOTES WHILE I READ THEM. YOU'RE FREE TO DO SO IF YOU WISH.

YOU MUST BASE YOUR DECISION ON THE FACTS AND ON THE LAW. YOU HAVE TWO DUTIES TO PERFORM. FIRST YOU MUST DETERMINE WHAT FACTS HAVE BEEN PROVED FROM THE EVIDENCE RECEIVED IN THE TRIAL AND NOT FROM ANY OTHER SOURCE. A FACT IS SOMETHING PROVED BY THE EVIDENCE OR BY STIPULATION. A STIPULATION IS AN AGREEMENT BETWEEN ATTORNEYS REGARDING THE FACTS. SECONDLY, YOU MUST APPLY THE LAW THAT I STATE TO YOU TO THE FACTS, AS YOU DETERMINE THEM, AND IN THIS WAY TO ARRIVE AT YOUR VERDICT.

YOU MUST ACCEPT AND FOLLOW THE LAW AS I STATE IT TO YOU, REGARDLESS OF WHETHER YOU AGREE WITH THE LAW. AND IF

ANYTHING CONCERNING THE LAW SAID BY THE ATTORNEYS IN THEIR ARGUMENTS OR AT ANY OTHER TIME DURING THE TRIAL CONFLICTS WITH MY INSTRUCTIONS ON THE LAW, THEN YOU MUST FOLLOW MY INSTRUCTIONS.

YOU MUST NOT BE INFLUENCED BY PITY FOR OR PREJUDICE AGAINST THE DEFENDANT. YOU MUST NOT BE BIASED AGAINST THE DEFENDANT BECAUSE HE'S BEEN ARRESTED FOR THIS OFFENSE, CHARGED WITH A CRIME, OR BROUGHT TO TRIAL. NONE OF THESE CIRCUMSTANCES IS EVIDENCE OF GUILT, AND YOU MUST NOT INFER OR ASSUME FROM ANY OR ALL OF THEM THAT THE DEFENDANT IS MORE LIKELY TO BE GUILTY THAN NOT GUILTY. YOU MUST NOT BE INFLUENCED BY MERE SENTIMENT, CONJECTURE, SYMPATHY, PASSION, PREJUDICE, PUBLIC OPINION, OR PUBLIC FEELING. BOTH THE PEOPLE AND THE DEFENDANT HAVE A RIGHT TO EXPECT THAT YOU WILL CONSCIENTIOUSLY CONSIDER AND WEIGH THE EVIDENCE, APPLY THE LAW, AND REACH A JUST VERDICT REGARDLESS OF THE CONSEQUENCES.

IF ANY RULE, DIRECTION, OR IDEA IS REPEATED OR STATED IN DIFFERENT WAYS IN THESE INSTRUCTIONS, NO EMPHASIS IS INTENDED AND YOU MUST NOT DRAW ANY INFERENCE BECAUSE OF IT'S REPETITION. DO NOT SINGLE OUT ANY PARTICULAR SENTENCE OR ANY INDIVIDUAL POINT OR INSTRUCTION AND IGNORE THE OTHERS. CONSIDER THE INSTRUCTIONS AS A WHOLE AND EACH OF THEM IN LIGHT OF ALL THE OTHERS.

THE ORDER IN WHICH THE INSTRUCTIONS ARE GIVEN HAS NO SIGNIFICANCE AS TO THEIR RELATIVE IMPORTANCE.

STATEMENTS MADE BY THE ATTORNEYS DURING THE TRIAL ARE NOT EVIDENCE. HOWEVER, IF THE ATTORNEYS HAVE STIPULATED OR AGREED TO A FACT, WHICH THEY HAVE, YOU MUST REGARD THAT FACT

AS PROVEN.

IF AN OBJECTION WAS SUSTAINED TO A QUESTION, DO NOT GUESS WHAT THE ANSWER NIGHT HAVE BEEN AND DO NOT SPECULATE AS TO THE REASON FOR THE OBJECTION.

DO NOT ASSUME TO BE TRUE ANY INSINUATION SUGGESTED BY A QUESTION ASKED A WITNESS. A QUESTION IS NOT EVIDENCE AND IT MAY BE CONSIDERED ONLY AS IT HELPS YOU TO UNDERSTAND THE ANSWER.

DO NOT CONSIDER FOR ANY PURPOSE ANY OFFER OF EVIDENCE THAT WAS REJECTED, OR ANY EVIDENCE THAT WAS STRICKEN BY THE COURT. TREAT IT AS THOUGH YOU NEVER HEARD IT.

YOU MUST DECIDE ALL QUESTIONS OF FACT IN THIS CASE FROM THE EVIDENCE RECEIVED IN THIS TRIAL AND NOT FROM ANY OTHER SOURCE.

YOU MUST NOT INDEPENDENTLY INVESTIGATE THE FACTS OR THE LAW OR CONSIDER OR DISCUSS FACTS AS TO WHICH THERE IS NO EVIDENCE. AND THIS MEANS, FOR EXAMPLE, THAT YOU MUST NOT ON YOUR OWN VISIT THE SCENE, CONDUCT EXPERIMENTS OR SOME REFERENCE WORKS OR PERSONS FOR ADDITIONAL INFORMATION.

YOU MUST NOT DISCUSS THIS CASE WITH ANY OTHER PERSON EXCEPT A FELLOW JUROR, AND THEN ONLY AFTER THE CASE IS SUBMITTED TO YOU FOR YOUR DECISION AND ONLY WHEN ALL 12 JURORS ARE PRESENT IN THE JURY ROOM.

PLEASE LEAVE YOUR NOTEBOOKS ON THE SEAT, ON YOUR SEAT OR ON THE TABLE IN THE JURY ROOM, WHEN YOU LEAVE DURING EACH RECESS ONCE YOU GET TO THE JURY ROOM. YOU WILL, OF COURSE, BE ABLE TO TAKE THEM INTO THE JURY ROOM WITH YOU.

YOUR NOTES ARE ONLY AN AID TO YOUR MEMORY AND THEY

SHOULD NOT TAKE PRECEDENCE OVER RECOLLECTION. A JUROR WHO DOES NOT TAKE NOTES OR DID NOT SHOULD RELY ON HIS OR HER RECOLLECTION OF THE EVIDENCE AND NOT BE INFLUENCED BY THE FACT THAT OTHER JURORS DID TAKE NOTES. NOTES ARE FOR THE NOTETAKER'S OWN PERSONAL USE IN REFRESHING HIS OR HER RECOLLECTION OF THE EVIDENCE.

FINALLY, SHOULD ANY DISCREPANCY EXIST BETWEEN A JUROR'S RECOLLECTION OF THE EVIDENCE AND THE A JUROR'S NOTES, OR BETWEEN ONE JUROR'S RECOLLECTION AND THAT OF ANOTHER, YOU MAY REQUEST THAT THE REPORTER READ BACK THE RELEVANT TESTIMONY WHICH MUST PREVAIL."

TYPICALLY, THE REPORTER WILL BE SENT INTO THE JURY ROOM IF YOU MAKE THAT REQUEST. BUT PLEASE REMEMBER WHAT I SAID THE OTHER DAY, WHICH IS IF YOU DO REQUEST A READ BACK, ALL 12 DELIBERATING JURORS WILL BE OBLIGED TO LISTEN TO ALL OF THAT PARTICULAR WITNESS'S TESTIMONY DURING HIS OR HER STAY ON THE WITNESS STAND DURING THAT SEGMENT, AND YOU WON'T BE PRIVILEGED TO JUST ASK THE REPORTER TO PICK OUT A PARTICULAR SENTENCE OR PARAGRAPH.

"EVIDENCE CONSISTS OF TESTIMONY OF WITNESSES, WRITINGS, MATERIAL OBJECTS, OR ANYTHING PRESENTED TO THE SENSES, AND OFFERED TO PROVE THE EXISTENCE OR NONEXISTENCE OF A FACT. EVIDENCE IS EITHER DIRECT OR CIRCUMSTANTIAL. DIRECT EVIDENCE IS EVIDENCE THAT DIRECTLY PROVES A FACT. IT IS EVIDENCE WHICH BY ITSELF, IF FOUND TO BE TRUE, ESTABLISHES THAT FACT.

CIRCUMSTANTIAL EVIDENCE IS EVIDENCE THAT IF FOUND TO BE TRUE PROVES A FACT FROM WHICH AN INFERENCE OF THE EXISTENCE OF ANOTHER FACT MAY BE DRAWN.

AN INFERENCE IS A DEDUCTION OF FACT THAT MAY LOGICALLY AND REASONABLY BE DRAWN FROM ANOTHER FACT OR A GROUP OF FACTS ESTABLISHED BY THE EVIDENCE. IT IS NOT NECESSARY THAT FACTS BE PROVED BY DIRECT EVIDENCE. IT MAY BE PROVED ALSO BY CIRCUMSTANTIAL EVIDENCE OR BY A COMBINATION OF DIRECT AND CIRCUMSTANTIAL EVIDENCE.

BOTH DIRECT AND CIRCUMSTANTIAL EVIDENCE ARE ACCEPTABLE AS A MEANS OF PROOF, AND NEITHER IS ENTITLED TO ANY GREATER WEIGHT THAN THE OTHER.

IN THE CRIME CHARGED IN COUNT 1 IN THIS CASE, RESIDENTIAL BURGLARY, THERE MUST EXIST A UNION OR JOINT OPERATION OF ACT OR CONDUCT AND A CERTAIN SPECIFIC INTENT IN THE MIND OF THE PERPETRATOR. UNLESS THIS SPECIFIC INTENT EXISTS, THE CRIME TO WHICH IT RELATES, BURGLARY, IS NOT COMMITTED.

THE CRIME OF BURGLARY REQUIRES THE SPECIFIC INTENT TO COMMIT A FELONY INSIDE A STRUCTURE UPON ENTERING IT.

THE SPECIFIC WITH WHICH AN ACT IS DONE MAY BE SHOWN BY THE CIRCUMSTANCES SURROUNDING THE COMMISSION OF THE ACT. HOWEVER, YOU MAY NOT FIND THE DEFENDANT GUILTY OF THE CRIME CHARGED IN COUNT 1 UNLESS THE PROVED CIRCUMSTANCES ARE NOT ONLY, NUMBER 1, CONSISTENT WITH THE THEORY THAT THE DEFENDANT HAD THE REQUIRED SPECIFIC INTENT, BUT NUMBER 2, CANNOT BE RECONCILED WITH ANY OTHER RATIONAL CONCLUSION.

ALSO, IF THE EVIDENCE AS TO SPECIFIC INTENT PERMITS TWO REASONABLE INTERPRETATIONS, ONE OF WHICH POINTS TO THE EXISTENCE OF THE SPECIFIC INTENT AND THE OTHER TO ITS/*R ABSENCE, YOU MUST ADOPT THAT INTERPRETATION WHICH POINTS TO

IT'S ABSENCE. IF, ON THE OTHER HAND, ONE INTERPRETATION OF THE EVIDENCE AS TO THE SPECIFIC INTENT APPEARS TO YOU TO BE REASONABLE AND THE OTHER INTERPRETATION TO BE UNREASONABLE, YOU MUST THEN ACCEPT THE REASONABLE INTERPRETATION AND REJECT THE UNREASONABLE.

IF YOU FIND THAT BEFORE THIS TRIAL THE DEFENDANT MADE A WILLFULLY FALSE OR DELIBERATELY MISLEADING STATEMENT CONCERNING THE CRIMES FOR WHICH HE IS NOW BEING TRIED, YOU MAY CONSIDER THAT STATEMENT AS A CIRCUMSTANCE TENDING TO PROVE A CONSCIOUSNESS OF GUILT. HOWEVER, THAT CONDUCT IS NOT SUFFICIENT BY ITSELF TO PROVE GUILT, AND ITS WEIGHT AND SIGNIFICANCE, IF ANY, ARE FOR YOU TO DECIDE.

NEITHER SIDE IS REQUIRED TO CALL AS WITNESSES ALL PERSONS WHO MAY HAVE BEEN PRESENT AT ANY OF THE EVENTS DISCLOSED BY THE EVIDENCE OR WHO MAY APPEAR TO HAVE SOME KNOWLEDGE OF THESE EVENTS. NEITHER SIDE IS REQUIRED TO PRODUCE ALL OBJECTS OR DOCUMENTS MENTIONED OR SUGGESTED BY THE EVIDENCE.

EVIDENCE HAS BEEN RECEIVED PERTAINING TO WRITTEN REPORTS PREPARED BY ONE OR MORE OF THE WITNESSES IN THIS CASE. THE ACTUAL PHYSICAL COPIES OF THESE REPORTS ARE NOT ADMISSABLE EVIDENCE AND MAY NOT BE OFFERED BY EITHER PARTY TO THIS CASE. YOU SHOULD DRAW NO INFERENCES FROM THE FACT THE ACTUAL PHYSICAL COPIES OF THESE REPORTS WERE NOT MARKED, OFFERED, OR RECEIVED INTO EVIDENCE. YOU ARE, HOWEVER, TO EVALUATE ANY TESTIMONY RELATED TO THEM IN THE SAME MANNER AS YOU EVALUATE ALL OTHER TESTIMONY IN THIS CASE.

EVIDENCE THAT AT SOME OTHER TIME A WITNESS MADE A

STATEMENT OR STATEMENTS THAT ARE INCONSISTENT OR CONSISTENT WITH HIS OR HER TESTIMONY IN THIS TRIAL MAY BE CONSIDERED BY YOU NOT ONLY FOR THE PURPOSE OF TESTING THE CREDIBILITY OF THE WITNESS, BUT ALSO AS EVIDENCE OF THE TRUTH OF THE FACTS AS STATED BY THE WITNESS ON THAT FORMER OCCASION.

IF YOU DISBELIEVE A WITNESS'S TESTIMONY THAT HE OR SHE NO LONGER REMEMBERS A CERTAIN EVENT, THAT TESTIMONY IS INCONSISTENT WITH A PRIOR STATEMENT OR STATEMENTS BY HIM OR HER DESCRIBING THAT EVENT.

EVERY PERSON WHO TESTIFIES UNDER OATH IS A WITNESS. YOU ARE THE JUDGES OF THE BELIEVABILITY OF A WITNESS AND THE WEIGHT TO BE GIVEN THE TESTIMONY OF EACH WITNESS.

IN DETERMINING THE BELIEVABILITY OF A WITNESS YOU MAY CONSIDER ANYTHING THAT HAS A TENDENCY TO PROVE OR DISPROVE THE TRUTHFULNESS OF THE TESTIMONY OF THE WITNESS, INCLUDING BUT NOT LIMITED TO ANY OF THE FOLLOWING:

THE EXTENT OF THE OPPORTUNITY OR ABILITY OF THE WITNESS TO SEE OR HEAR OR OTHERWISE BECOME AWARE OF ANY MATTER ABOUT WHICH THE WITNESS HAS TESTIFIED.

YOU MAY CONSIDER THE ABILITY OF THE WITNESS TO REMEMBER OR TO COMMUNICATE ANY MATTER ABOUT WHICH THE WITNESS TESTIFIED.

YOU MAY CONSIDER THE CHARACTER AND QUALITY OF THAT TESTIMONY, THE DEMEANOR AND MANNER OF THE WITNESS WHILE TESTIFYING, THE EXISTENCE OR NONEXISTENCE OF A BIAS, INTEREST, OR OTHER MOTIVE, THE EXISTENCE OR NONEXISTENCE OF ANY FACT TESTIFIED TO BY THE WITNESS, OR THE ATTITUDE OF THE WITNESS TOWARD THIS ACTION OR TOWARD THE GIVING OF TESTIMONY.

YOU MAY CONSIDER THE WITNESS'S PRIOR CONVICTION OF A FELONY.

DISCREPANCIES IN A WITNESS'S TESTIMONY OR BETWEEN A WITNESS'S TESTIMONY AND THAT OF OTHER WITNESS, IF THERE WERE ANY, DO NOT NECESSARILY MEAN THAT A WITNESS SHOULD BE DISCREDITED. FAILURE OF RECOLLECTION IS COMMON. INNOCENT MISRECOLLECTION IS NOT UNCOMMON. TWO PERSONS WITNESSING AN INCIDENT OR A TRANSACTION OFTEN WILL SEE OR HEAR IT DIFFERENTLY. YOU SHOULD CONSIDER WHETHER A DISCREPANCY RELATES TO AN IMPORTANT MATTER OR ONLY TO SOMETHING TRIVIAL.

A WITNESS WHO IS WILLFULLY FALSE IN ONE MATERIAL PART OF HIS OR HER TESTIMONY IS TO BE DISTRUSTED IN OTHERS. YOU MAY REJECT THE WHOLE TESTIMONY OF A WITNESS WHO WILLFULLY HAS TESTIFIED FALSELY AS TO A MATERIAL POINT UNLESS FROM ALL THE EVIDENCE, YOU BELIEVE THE PROBABILITY OF TRUTH FAVORS HIS OR HER TESTIMONY IN OTHER PARTICULARS.

YOU ARE NOT BOUND TO DECIDE AN ISSUE OF FACT IN ACCORDANCE WITH THE TESTIMONY OF A NUMBER OF WITNESSES, WHICH DOES NOT CONVINCE YOU, AS AGAINST THE TESTIMONY OF A LESSER NUMBER OR OTHER EVIDENCE, WHICH APPEALS TO YOUR MIND WITH MORE CONVINCING FORCE. YOU MAY NOT DISREGARD THE TESTIMONY OF A GREATER NUMBER OF WITNESSES MERELY FROM CAPRICE, WHIM, OR PREJUDICE, OR FROM A DESIRE TO FAVOR ONE SIDE AGAINST THE OTHER. YOU MUST NOT DECIDE AN ISSUE BY THE SIMPLE PROCESS OF COUNTING THE NUMBER OF WITNESSES WHO HAVE TESTIFIED ON THE OPPOSING SIDES. THE FINAL TEST, OF COURSE, IS NOT IN THE RELATIVE NUMBER OF WITNESSES BUT IN THE CONVINCING FORCE OF THE EVIDENCE.

YOU SHOULD GIVE THE TESTIMONY OF A SINGLE WITNESS

WHATEVER WEIGHT YOU THINK IT DISSEVERS. TESTIMONY BY ONE WITNESS WHICH YOU BELIEVE CONCERNING ANY FACT IS SUFFICIENT FOR THE PROOF OF THAT FACT. YOU SHOULD CAREFULLY REVIEW ALL THE EVIDENCE UPON WHICH THE PROOF OF THAT FACT DEPENDS.

THE FLIGHT OF A PERSON IMMEDIATELY AFTER THE COMMISSION OF A CRIME, OR AFTER HE IS ACCUSED OF A CRIME, IS NOT SUFFICIENT IN ITSELF TO ESTABLISH HIS GUILT, BUT IS A FACT WHICH, IF PROVED, MAY BE CONSIDERED BY YOU IN LIGHT OF THE OTHER PROVED FACTS IN DECIDING WHETHER A DEFENDANT IS GUILTY OR NOT GUILTY. THE WEIGHT TO WHICH THIS CIRCUMSTANCE IS ENTITLED IS A MATTER FOR YOU TO DECIDE.

AN ADMISSION IS A STATEMENT MADE BY THE DEFENDANT WHICH DOES NOT IN ITSELF ACKNOWLEDGE HIS GUILT OF THE CRIMES FOR WHICH THE DEFENDANT IS ON TRIAL, BUT WHICH STATEMENT TENDS TO PROVE HIS GUILT WHEN CONSIDERED WITH THE REST OF THE EVIDENCE.

YOU ARE THE EXCLUSIVE JUDGES AS TO WHETHER THE DEFENDANT MADE AN ADMISSION, AND IF SO, WHETHER THAT STATEMENT IS TRUE IN WHOLE OR IN PART.

EVIDENCE OF AN ORAL ADMISSION OF THE DEFENDANT NOT MADE IN COURT SHOULD BE VIEWED WITH CAUTION.

NO PERSON MAY BE CONVICTED OF A CRIMINAL OFFENSE UNLESS THERE'S SOME PROOF OF EACH ELEMENT OF THE CRIME INDEPENDENT OF ANY ADMISSION MADE BY HIM OUTSIDE OF THIS TRIAL.

THE IDENTITY OF THE PERSON WHO IS ALLEGED TO HAVE COMMITTED A CRIME IS NOT AN ELEMENT OF THE CRIME. THE IDENTITY MAY BE ESTABLISHED BY AN ADMISSION."

WOULD YOU LIKE A MOMENT, MA'AM? COULD I HAVE COUNSEL

APPROACH FOR A MOMENT.

(SIDEBAR CONFERENCE, NOT REPORTED.)

THE COURT: WHILE I WAS READING THE INSTRUCTIONS, THERE WAS ONE ADDITIONAL INSTRUCTION THAT I RECALLED THAT WE HAD NOT TALKED ABOUT, AND I JUST HAD A SIDEBAR CONFERENCE WITH THE ATTORNEYS AND THEY AGREE WITH ME THAT 2.23 MUST BE GIVEN. I'LL ASK THE CLERK TO PLEASE PRINT OUT 2.23. I'LL READ IT AT THIS TIME FROM THE BOOK.

"THE FACT THAT A WITNESS HAS BEEN CONVICTED OF A FELONY, IF THIS IS A FACT, MAY BE CONSIDERED BY YOU ONLY FOR THE PURPOSE OF DETERMINING THE BELIEVABILITY OF THAT WITNESS. THE FACT OF A CONVICTION DOES NOT NECESSARILY DESTROY OR IMPAIR A WITNESS'S BELIEVABILITY. IT IS ONE OF THE CIRCUMSTANCES THAT YOU MAY CONSIDER IN WEIGHING THE TESTIMONY OF THAT WITNESS.

A DEFENDANT IN A CRIMINAL ACTION IS PRESUMED TO BE INNOCENT UNTIL THE CONTRARY IS PROVED, AND IN CASE OF A REASONABLE DOUBT WHETHER HIS GUILT IS SATISFACTORILY SHOWN, HE IS ENTITLED TO A VERDICT OF NOT GUILTY. THIS PRESUMPTION PLACES UPON THE PEOPLE THE BURDEN OF PROVING HIM GUILTY BEYOND A REASONABLE DOUBT.

REASONABLE DOUBT IS DEFINED AS FOLLOWS. IT IS NOT A MERE POSSIBLE DOUBT BECAUSE EVERYTHING RELATING TO HUMAN AFFAIRS IS OPEN TO SOME POSSIBLE OR IMAGINARY DOUBT. IT IS THAT STATE OF THE CASE WHICH AFTER THE ENTIRE COMPARISON AND CONSIDERATION OF ALL THE EVIDENCE LEAVES THE MINDS OF THE JURORS IN THAT CONDITION THAT THEY CANNOT SAY THEY FEEL AN ABIDING CONVICTION OF THE TRUTH OF THE CHARGE.

IN THE CRIMES CHARGED IN THIS CASE IN COUNTS 2, 3 AND 4, NAMELY ASSAULT WITH A FIREARM, POSSESSION BY A FELON OF A FIREARM, AND POSSESSION OF A SAWED-OFF SHOTGUN, IN THOSE THREE CRIMES THERE MUST EXIST A UNION OR JOINT OPERATION OF ACT OR CONDUCT AND GENERAL CRIMINAL INTENT. GENERAL INTENT, AS OPPOSED TO SPECIFIC INTENT, DOES NOT REQUIRE AN INTENT TO VIOLATE THE LAW. WHEN A PERSON INTENTIONALLY DOES THAT WHICH THE LAW DECLARES TO BE A CRIME, HE IS ACTING WITH GENERAL CRIMINAL INTENT EVEN THOUGH HE MAY NOT KNOW THAT HIS ACT OR CONDUCT IS UNLAWFUL.

WHEN, AS IN THIS CASE, IT IS ALLEGED THAT THE CRIME CHARGED WAS COMMITTED ON OR ABOUT A CERTAIN DATE, IF YOU FINDS THAT THE CRIME WAS COMMITTED, IT IS NOT NECESSARY THAT THE PROOF SHOW THAT IT WAS COMMITTED ON THAT PRECISE DATE. IT IS SUFFICIENT IF THE PROOF SHOWS THAT THE CRIME WAS COMMITTED ON OR ABOUT THAT DATE.

DEFENDANT IS ACCUSED IN COUNT 1 OF HAVING COMMITTED THE CRIME OF BURGLARY, A VIOLATION OF SECTION 459 OF THE PENAL CODE. EVERY PERSON WHO ENTERS ANY BUILDING WITH THE SPECIFIC INTENT TO COMMIT A FELONY IS GUILTY OF THE CRIME OF BURGLARY IN VIOLATION OF PENAL CODE SECTION 459.

A BUILDING IS A STRUCTURE. IT DOES NOT MATTER WHETHER THE INTENT WITH WHICH THE ENTRY WAS MADE WAS THEREAFTER CARRIED OUT.

IN ORDER TO PROVE THIS CRIME, EACH OF THE FOLLOWING TWO ELEMENTS MUST BE PROVED: NUMBER 1, A PERSON ENTERED A BUILDING, AND NUMBER 2, AT THE TIME OF THE ENTRY, THAT PERSON HAD THE SPECIFIC INTENT TO COMMIT THE CRIME OF ASSAULT WITH A

DEADLY WEAPON.

IF YOU SHOULD FIND THE DEFENDANT GUILTY OF BURGLARY, YOU MUST DETERMINE THE DEGREE THEREOF AND STATE THAT DEGREE IN YOUR VERDICT.

THERE ARE TWO DEGREES OF BURGLARY. EVERY BURGLARY OF AN INHABITED DWELLING HOME IS A BURGLARY OF THE FIRST DEGREE. ALL OTHER KINDS OF BURGLARY ARE OF A SECOND DEGREE." AND YOUR VERDICT FORM WILL BE SET UP WITH BLANK SPACES FOR YOU TO PUT IN EITHER FIRST OR SECOND DEGREE.

"AN INHABITED DWELLING HOUSE IS A STRUCTURE WHICH IS CURRENTLY USED AS A DWELLING WHETHER OCCUPIED OR NOT. IT IS INHABITED ALTHOUGH THE OCCUPANTS MAY BE TEMPORARILY ABSENT.

DEFENDANT IS ACCUSED IN COUNT 2 OF HAVING VIOLATED *SECTION 245(A)(2) OF THE PENAL CODE, A CRIME. EVERY PERSON* WHO COMMIT AN ASSAULT UPON THE PERSON OF ANOTHER WITH A *FIREARM IS GUILTY OF A VIOLATION OF SECTION 245(A)(2) OF THE* PENAL CODE, A CRIME.

A DEADLY WEAPON IS ANY OBJECT, INSTRUMENT, OR WEAPON WHICH IS USED IN SUCH A MANNER AS TO BE CAPABLE OF PRODUCING, AND LIKELY TO PRODUCE, DEATH OR GREAT BODILY INJURY. A FIREARM IS A DEADLY WEAPON, AND A FIREARM INCLUDES A SHOTGUN.

IN ORDER TO PROVE THIS CRIME, EACH OF THE FOLLOWING ELEMENTS MUST BE PROVED: NUMBER 1, A PERSON WAS ASSAULTED, AND NUMBER 2, THE ASSAULT WAS COMMITTED WITH A FIREARM.

IN ORDER TO PROVE AN ASSAULT, EACH OF THE FOLLOWING ELEMENTS MUST BE PROVED:" -- NOW, THIS IS ACTUALLY WHAT I'M GIVING YOU NOW IS THE DEFINITION OF WHAT WE CALL "SIMPLE ASSAULT" FOR YOU TO UNDERSTAND WHAT ASSAULT WITH A DEADLY

WEAPON OR WITH A FIREARM IS. IT WILL ALSO BE NECESSARY FOR YOU TO KNOW WHAT ASSAULT IS. AND THE DEFINITION OF ASSAULT UNDER THE LAW WILL NOW BE GIVEN.

"-- A PERSON WILLFULLY COMMITTED AN ACT WHICH BY ITS NATURE WOULD PROBABLY AND DIRECTLY RESULT IN THE APPLICATION OF PHYSICAL FORCE ON ANOTHER PERSON." THAT'S THE FIRST ELEMENT OF ASSAULT.

"NUMBER 2, THE PERSON COMMITTING THE CONTACT WAS AWARE OF FACTS THAT WOULD LEAD A REASONABLE PERSON TO REALIZE THAT AS A DIRECT, NATURAL, AND PROBABLE RESULT OF THIS ACT THAT PHYSICAL FORCE WOULD BE APPLIED TO ANOTHER PERSON.

AND NUMBER 2, AT THE TIME THE ACT WAS COMMITTED, THE PERSON COMMITTING THE ACT HAD THE PRESENT ABILITY TO APPLY PHYSICAL FORCE TO THE PERSON OF ANOTHER.

THE WORD WILLFULLY MEANS THAT THE PERSON COMMITTING THE ACT DID SO INTENTIONALLY. HOWEVER, AN ASSAULT DOES NOT REQUIRE AN INTENT TO CAUSE INJURY TO ANOTHER PERSON, OR AN ACTUAL AWARENESS OF THE RISK THAT INJURY MIGHT OCCUR TO ANOTHER PERSON.

TO CONSTITUTE AN ASSAULT, IS NOT NECESSARY THAT ANY ACTUAL INJURY BE INFLICTED. HOWEVER, IF AN INJURY IS INFLICTED IT MAY BE CONSIDERED IN CONNECTION WITH OTHER EVIDENCE IN DETERMINING WHETHER AN ASSAULT WAS COMMITTED.

AN ASSAULT INCLUDES A CONDITIONAL THREAT TO APPLY PHYSICAL FORCE UPON ANOTHER, PROVIDING THAT:

NUMBER 1, THE THREAT COMMANDS THE IMMEDIATE PERFORMANCE OF SOME ACT WHICH THE THREATENING PARTY HAS NO LEGAL RIGHT TO DEMAND.

NUMBER 2, THE THREAT IS MADE WITH THE INTENTION OF COMPELLING PERFORMANCE OF THAT ACT BY THE APPLICATION OF PHYSICAL FORCE.

NUMBER 3, THE PERSON MAKING THE THREAT HAS PLACED HIMSELF PHYSICALLY IN A POSITION TO INFLICT SUCH PHYSICAL FORCE.

AND NUMBER 4, THE PERSON HAS PROCEEDED AS FAR AS IT IS NECESSARY TO GO IN ORDER TO CARRY OUT HIS INTENTION.

A NECESSARY ELEMENT OF AN ASSAULT IS THAT THE PERSON COMMITTING THE ASSAULT HAVE THE PRESENT ABILITY TO APPLY PHYSICAL FORCE TO THE PERSON OF ANOTHER. THIS MEANS THAT AT THE TIME OF THE ACT WHICH BY ITS NATURE WOULD PROBABLY AND DIRECTLY RESULT IN THE APPLICATION OF PHYSICAL FORCE UPON THE PERSON OF ANOTHER, THE PERPETRATOR OF THE ACT MUST HAVE THE PHYSICAL MEANS TO ACCOMPLISH THAT RESULT. IF THERE IS THIS ABILITY THAT PRESENT ABILITY EXISTS, EVEN IF THERE IS NO INJURY.

DEFENDANT IS ACCUSED IN COUNT 3 OF HAVING VIOLATED SECTION 12021(A)(1) OF THE PENAL CODE, A CRIME. EVERY PERSON WHO, HAVING PREVIOUSLY BEEN CONVICTED OF A FELONY, OWNS, PURCHASES, RECEIVED, OR HAS IN HIS POSSESSION OR UNDER HIS CUSTODY OR CONTROL ANY PISTOL, REVOLVER, OR OTHER FIREARM IS GUILTY OF A VIOLATION OF SECTION 12021(A)(1) OF THE PENAL CODE, A CRIME.

IN THIS CASE, THE PREVIOUS FELONY CONVICTION HAS ALREADY BEEN ESTABLISHED BY STIPULATION SO THAT NO FURTHER PROOF OF THAT FACT IS REQUIRED. YOU MUST ACCEPT AS TRUE THE EXISTENCE OF THIS PREVIOUS FELONY CONVICTION.

IN ORDER TO PROVE THIS CRIME, EACH OF THE FOLLOWING ELEMENTS MUST BE PROVED: NUMBER 1, THE DEFENDANT HAD IN HIS POSSESSION A SHOTGUN, AND NUMBER 2, THE DEFENDANT HAD KNOWLEDGE OF THE PRESENCE OF THE SHOTGUN.

DEFENDANT IS ACCUSED IN COUNT 4 OF HAVING VIOLATED SECTION 12020(A)(1) OF THE PENAL CODE, A CRIME. EVERY PERSON WHO POSSESSES A SHORT-BARRELED SHOTGUN IS GUILTY OF A VIOLATION OF PENAL CODE SECTION 12020(A)(1), A CRIME.

A SHORT-BARRELED SHOTGUN MEANS ANY OF THE FOLLOWING: A, A FIREARM WHICH IS DESIGNED OR REDESIGNED TO FIRE A FIXED SHOTGUN SHELL AND HAVING A BARREL OR BARRELS OF LESS THAN 18 INCHES IN LENGTH, OR, B, A FIREARM, WHICH HAS AN OVERALL LENGTH OF LESS THAN 26 INCHES AND WHICH IS DESIGNED OR REDESIGNED TO FIRE A FIXED SHOTGUN SHELL.

IN ORDER TO PROVE THIS CRIME, IT MUST SIMPLY BE PROVEN THAT A PERSON POSSESSED A SHORT-BARRELED SHOTGUN.

IT IS ALLEGED IN COUNTS 1 AND 2 THAT THE DEFENDANT PERSONALLY USED A FIREARM DURING THE COMMISSION OF THE CRIMES CHARGED THEREIN. IF YOU FIND THE DEFENDANT GUILTY OF ONE OR MORE OF THE CRIMES CHARGED, YOU MUST DETERMINE WHETHER THE DEFENDANT PERSONALLY USED A FIREARM IN THE COMMISSION OF THOSE FELONIES.

THE WORD FIREARM INCLUDES A SHOTGUN. THE FIREARM NEED NOT BE PROVEN OPERABLE.

THE TERM PERSONALLY USED A FIREARM AS USED IN THIS INSTRUCTION MEANS THAT THE DEFENDANT MUST HAVE INTENTIONALLY DISPLAYED A FIREARM IN A MENACING MANNER, INTENTIONALLY FIRED IT, OR INTENTIONALLY STRUCK OR HIT A HUMAN BEING WITH IT.

THE PEOPLE HAVE THE BURDEN OF PROVING THE TRUTH OF THIS ALLEGATION. IF YOU HAVE REASONABLE DOUBT AS TO IT'S TRUTH, YOU MUST FIND IT TO BE NOT TRUE. INCLUDE A SPECIAL FINDING ON THAT QUESTION IN YOUR VERDICT USING A FORM THAT WILL BE SUPPLIED FOR THAT PURPOSE.

IF YOU ARE NOT SATISFIED BEYOND A REASONABLE DOUBT THAT THE DEFENDANT IS GUILTY OF THE CRIME IN COUNT 2, ASSAULT WITH A FIREARM, AND IF YOU UNANIMOUSLY SO FIND HIM NOT GUILTY, YOU MAY THEN CONVICT HIM OF A LESSER CRIME PROVIDED YOU ARE SATISFIED BEYOND A REASONABLE DOUBT THAT HE IS GUILTY OF THAT LESSER CRIME. THIS APPLIES ONLY TO COUNT 2. THE CHARGE IS ASSAULT WITH A DEADLY WEAPON OR FIREARM. AND AS I SAID, IF YOU FIND HIM NOT GUILTY OF THAT CHARGE, YOU HAVE THE OPPORTUNITY OF THEN A LESSER CRIME WHICH IS CALLED SIMPLE ASSAULT.

THUS, YOU ARE TO DETERMINE WHETHER THE DEFENDANT IS GUILTY OR NOT GUILTY OF THE CRIME CHARGED IN COUNT 2, OR OF ANY LESSER CRIME. NOW, IN DOING SO, YOU HAVE THE DISCRETION TO CHOOSE THE ORDER IN WHICH YOU EVALUATE EACH CRIME AND CONSIDER THE EVIDENCE PERTAINING TO IT. YOU MAY FIND IT TO BE PRODUCTIVE TO CONSIDER AND REACH TENTATIVE CONCLUSIONS ON BOTH THE CHARGE AND THE LESSER CRIME BEFORE YOU REACH ANY FINAL VERDICTS.

BEFORE YOU RETURN ANY FINAL OR FORMAL VERDICTS, THOUGH, YOU MUST BE GUIDED BY THE FOLLOWING. THIS IS KIND OF A COMPLICATED AREA. I WILL REVIEW IT WITH YOU JUST BEFORE YOU LEAVE FOR DELIBERATIONS LATER THIS AFTERNOON. AND I AM READING NOW FROM WHAT'S CALLED CALJIC 17.12, WHICH IS -- YOU

MAY WISH TO NOTE THAT IF YOU WANT TO REFER TO IT DURING YOUR DELIBERATIONS.

AS TO THE LESSER INCLUDED OFFENSE OF SIMPLE ASSAULT, COUNT 2, PLEASE BE GUIDED BY THE FOLLOWING: IF YOU UNANIMOUSLY FIND THE DEFENDANT GUILTY OF THE CHARGED CRIME, ASSAULT WITH A FIREARM, THEN YOUR FOREPERSON SHOULD SIMPLY SIGN AND DATE THAT VERDICT FORM, AND THE VERDICT FORM REGARDING THE LESSER CRIME SHOULD SIMPLY REMAIN UNSIGNED AND BLANK AND BROUGHT BACK. IF YOU CAN'T REACH A UNANIMOUS VERDICT AS TO THE CRIME CHARGED IN COUNT 2, DO NOT SIGN ANY VERDICT FORM AS TO COUNT 2 AND REPORT YOUR DISAGREEMENT TO THE COURT.

THE COURT CANNOT ACCEPT A VERDICT, A GUILTY VERDICT, ON THE LESSER CRIME, UNLESS THE JURY ALSO UNANIMOUSLY FINDS AND RETURNS A SIGNED VERDICT OF NOT GUILTY AS TO THE GREATER CRIME.

IF YOU UNANIMOUSLY AGREE AND FIND THE DEFENDANT NOT GUILTY OF THE CRIME WITH WHICH HE IS CHARGED, YOU CANNOT REACH A UNANIMOUS AGREEMENT TO THE LESSER CRIME, THEN YOUR FOREPERSON SHOULD SIGN AND DATE THE NOT GUILTY FORM AS TO CHARGED GREATER CRIME. LEAVE THE OTHER ONE BLANK. REPORT THE DISAGREEMENT TO THE COURT.

NOW, I'LL TELL YOU AGAIN, THE SIMPLE WAY TO LOOK AT THIS IS THIS WAY AS TO COUNT 2, ASSAULT WITH A FIREARM. THERE ARE THREE POSSIBLE THINGS THAT CAN HAPPEN THAT YOU'LL COME UP WITH. YOU'RE EITHER GOING TO FIND THE DEFENDANT GUILTY, YOU'RE GOING TO FIND HIM NOT GUILTY, OR YOU'RE NOT GOING TO BE ABLE TO REACH A UNANIMOUS VERDICT ON COUNT 2. THOSE ARE

THE ONLY THREE THINGS THAT CAN HAPPEN.

ONLY IF YOU FIND HIM NOT GUILTY OF COUNT 2 ONLY IN THAT INSTANCE, CAN I THEN ACCEPT A VERDICT ON THE LESSER OFFENSE OF ASSAULT. IF YOU FIND HIM GUILTY OF THAT CRIME CHARGED, THE CHARGED CRIME OF ASSAULT WITH A FIREARM, OR IF YOU ARE HUNG AND CANNOT REACH A VERDICT ON THE CHARGED CRIME, THOSE TWO INSTANCES YOU'LL LEAVE THE SIMPLE ASSAULT VERDICT FORMS BLANK. I CAN'T ACCEPT A VERDICT ON IT. ONLY IF YOU FIND HIM NOT GUILTY OF THE CHARGED CRIME CAN I ACCEPT A VERDICT ON THE LESSER CRIME.

SO I HAVE SOME CONCLUDING INSTRUCTIONS TO GIVE TO YOU. THEY WILL BE MUCH BRIEFER THAN THE ONES I JUST READ, AND FAR MORE SIMPLE. AND I BELIEVE THEY ARE BETTER GIVEN AFTER THE ATTORNEYS HAVE ADDRESSED YOU WITH THEIR CLOSING ARGUMENT. SO THAT WILL BE AFTER THE ATTORNEYS ADDRESS YOU, AND ALL OF THAT WILL BE AFTER LUNCH.

WE'RE GOING TO RESUME AT 1:45. IT'S NOW 12:15. YOU HAVE AN HOUR AND A HALF FOR LUNCH. BE READY TO GO AT A QUARTER TO 2. LEAVE YOUR NOTEBOOKS IN PLACE. PLEASE REMEMBER NOT TO FORM OR EXPRESS OPINIONS OR TALK ABOUT THIS CASE. WE'LL SEE YOU AT A QUARTER TO 2.

(AT 12:15 P.M. THE NOON RECESS WAS TAKEN TO RESUME AT 1:45 P.M. OF THE SAME DAY.)

EL CAJON, CALIFORNIA; THURSDAY, JANUARY 6, 2005; 1:47 P.M.

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT OUT OF THE PRESENCE OF THE JURY:)

THE COURT: WE'RE ON THE RECORD, PEOPLE VERSUS CUNNINGHAM. EVERYBODY BUT THE JURORS ARE PRESENT, BOTH THE ATTORNEYS AND THE DEFENDANT.

MR. GULLEY?

MR. GULLEY: YES, YOUR HONOR. AS I INDICATED TO THE COURT DURING PRETRIAL, WE DID HAVE ONE MS. SHERRY ROBBINS. MS. ROBBINS INDICATED THAT SHE HAD TO WORK LAST NIGHT AND HER CAR BROKE DOWN THIS MORNING. SHE WAS UNDER SUBPOENA TO BE HERE. IT WAS MY CLIENT'S WISH THAT SHE TESTIFY. WE HAD NO IDEA WHAT TIME SHE WAS GOING TO COME. SHE NEVER DID CONTACT US AGAIN. MY CLIENT STILL WANTS HER TO TESTIFY. WE WOULD BE ASKING THE COURT TO ISSUE A WARRANT FOR HER ARREST. I HAVE A SERVICE OF SUBPOENA PRESENT.

THE COURT: WELL, SHE'S NOT GOING TO BE ALLOWED TO TESTIFY BECAUSE THE EVIDENCE IS IN. BUT IF YOU WOULD LIKE THE COURT TO ISSUE THE WARRANT AND ATTEMPT TO GET IT SERVED, I WILL DO SO. AND DEPENDING ON WHEN OR IF SHE IS CONTACTED, WE'LL AT LEAST GET AN EXPLANATION TO WHY SHE DIDN'T SHOW UP. BUT THE EVIDENCE IS IN THE CASE. IT'S OVER WITH AT THIS POINT. THE COURT WILL ORDER A WARRANT FOR THE ARREST OF SHERRY ROBBINS. IT WILL BE A $1,000 BENCH WARRANT. IT APPEARS SHE WAS PROPERLY SERVED BY A SUBPOENA.

AND WERE YOU IN CONTACT WITH HER, OR --

MR. GULLEY: NO, MY INVESTIGATOR WAS.

THE COURT: AND THE LAST WORD WAS SHE HAD A CAR

BREAKDOWN TODAY?

MR. GULLEY: RIGHT. THIS MORNING SHE WAS IN THE SOUTHBAY AREA. SHE WAS CALLING FROM A PAY PHONE TO A ROOMMATE WHO THEN CALLED MY INVESTIGATOR. BUT SHE NEVER GAVE AN ADDRESS FOR MY INVESTIGATOR TO PICK HER UP. AND, THEN, AS OF THE TIME MR. CUNNINGHAM WAS OFF THE STAND, SHE HAD NOT CALLED BACK.

THE COURT: OKAY. THE COURT WILL ISSUE THE WARRANT AND WILL ORDER THAT IT BE SERVED. AND IF SHE'S PICKED UP ON THE WARRANT PRIOR TO THIS VERDICT COMING IN, THEN WE'LL SEE WHERE WE GO FROM THERE.

MR. GULLEY: ALL RIGHT. THANK YOU.

THE COURT: ALL RIGHT. JANET, WILL YOU GO GET OUR JURORS, PLEASE.

MR. LINK: I PUT THAT LAST VERDICT FORM ON YOUR DESK, YOUR HONOR. I SHOWED IT TO MR. GULLEY.

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT IN THE PRESENCE OF THE JURY:)

THE COURT: ALL RIGHT. WE'RE BACK ON THE RECORD ON PEOPLE VERSUS CUNNINGHAM. WE HAVE NOW THE PRESENCE OF ALL 14 JURORS, BOTH ATTORNEYS, AND THE DEFENDANT.

THE ATTORNEYS WILL NOW PRESENT THEIR CLOSING ARGUMENTS TO YOU. IT IS THEIR SUMMATION OF THE EVIDENCE THAT YOU'VE HEARD COMBINED WITH THE LAW THAT THE COURT HAS STATED TO YOU, AND THEIR CHANCE TO ATTEMPT TO CONVINCE YOU TO SEE THINGS THEIR WAY. WHAT THEY SAY IS NOT EVIDENCE. YOU'VE HEARD ALL THE EVIDENCE ALREADY.

AND IN THE EVENT THERE IS AN ATTORNEY WHO OBJECTS THAT

THE OTHER ONE HAS ARGUED SOMETHING TO YOU THAT DIDN'T COME INTO EVIDENCE, WHICH IS MANY TIMES WHAT THE OBJECTION IS, I'LL DO MY BEST TO REMEMBER WHETHER OR NOT IT WAS IN EVIDENCE. BUT WE'VE HAD THOUSANDS OF WORDS SPOKEN ALREADY IN THE TRIAL, AND IT'S HARD SOMETIMES FOR ME TO INSTANTANEOUSLY REMEMBER IF SOMETHING WAS OR WAS NOT PORT OF THE EVIDENCE. ULTIMATELY, IT'S GOING TO BE YOUR DECISION AS TO WHAT WAS SAID AND WHAT WASN'T SAID.

IF I SHOULD OVERRULE AN OBJECTION ON GROUNDS OF THERE BEING ARGUMENT OF SOMETHING NOT IN EVIDENCE, IT'S NOT NECESSARILY BECAUSE I BELIEVE IT WAS IN EVIDENCE. MORE THAN LIKELY, I CAN'T RECALL ONE WAY OR THE OTHER, AND IT WILL BE UP TO YOU. I'M SURE NEITHER ATTORNEY WILL INTENTIONALLY ARGUE SOMETHING THAT DIDN'T COME IN. BUT MANY TIMES THERE ARE ARGUMENTS FOR WHICH THERE IS AN OBJECTION IN THAT REGARD. SO I'LL DO MY BEST TO RULE ON IT AND TRY TO REMEMBER IF IT CAME IN OR NOT. BUT IF I CAN'T, I CAN'T.

ALL RIGHT. FIRST FOR THE PEOPLE WILL BE MR. LINK.

MR. LINK: THANK YOU, YOUR HONOR.

LADIES AND GENTLEMEN, THESE ARE SERIOUS CHARGES. BUT DON'T TAKE IT THE WRONG WAY. THIS IS A SIMPLE CASE. IT'S A SIMPLE CASE IN THE FACT THAT THERE ARE FOUR CHARGES, TWO OF THEM YOU ALREADY KNOW. AND YOU'VE HAD A LOT OF LAW. SOME OF IT YOU ABSORBED, SOME OF IT YOU DIDN'T. I WANT TO GO OVER -- I'M NOT GOING TO GO OVER ALL THOSE INSTRUCTIONS AGAIN, BUT I'M GOING TO GO OVER WHAT I LIKE TO CALL THE MEAT AND POTATOES OF WHAT YOU REALLY NEED TO LOOK AT, THE ACTUAL CRIME ITSELF, AND I WANT TO EXPLAIN A FEW THINGS TO YOU.

THE FIRST COUNT IS BURGLARY, AND IT BREAKS IT DOWN INTO TWO ELEMENTS. YOU HAVE TO ENTER A BUILDING, AND AT THE TIME OF THE ENTRY, YOU HAVE TO HAVE THE INTENT TO COMMIT A FELONY. IN THIS PARTICULAR CASE, THE FELONY IS YOU HAVE A SPECIFIC INTENT TO COMMIT THE CRIME OF ASSAULT WITH A DEADLY WEAPON.

NOW, A LOT OF PEOPLE MIGHT HAVE A LOT OF PRECONCEIVED NOTIONS ABOUT WHAT BURGLARY IS. YOU PICTURE A PERSON ALL IN BLACK PRYING IN A WINDOW OR A DOOR AND GETTING IN THERE SOMEHOW AND THEN STEAL SOMETHING. ALL MISCONCEPTIONS. ALL YOU HAVE TO DO IS ENTER A BUILDING, IS WALK THROUGH THE DOORWAY. BOOM, THERE'S YOUR ENTRY RIGHT THERE.

AND WHEN YOU WALK THROUGH THAT DOORWAY, YOU HAVE TO HAVE THE INTENT TO COMMIT A FELONY. IT DOESN'T HAVE TO BE THEFT. AS I SAID IN THIS CASE, YOU HAVE TO HAVE THE INTENT TO COMMIT THE CRIME OF ASSAULT WITH A DEADLY WEAPON, WHICH I HAVE PROVEN TODAY THROUGH MY WITNESSES, AND, ACTUALLY, THE BEST WITNESS, THE DEFENDANT HIMSELF. BUT I WILL GET INTO ALL THE FACTS. I STILL WANT TO GO OVER SOME MORE OF THE ELEMENTS BEFORE I GO THROUGH ALL THE FACTS OF THE CASE.

ASSAULT WITH A DEADLY WEAPON. ONCE AGAIN, IT BREAKS IT DOWN. A PERSON WAS ASSAULTED, AND THAT ASSAULT WAS COMMITTED WITH A FIREARM. WELL, WE KNOW, LADIES AND GENTLEMEN, THAT AN ASSAULT WAS COMMITTED. IT WAS COMMITTED BY A FIREARM. SO YOU DON'T REALLY HAVE TO WORRY ABOUT THAT. BUT ASSAULT IS A STRANGE LEGAL TERM. AND YOU'RE GOING TO READ IT, AND IT'S GOING TO CONFUSE YOU.

AND IT DEFINES IT AS SUCH -- AND THIS IS GOING TO BE VERY CONFUSING -- A PERSON WILLFULLY COMMITTED AN ACT WHICH

BY IT'S NATURE WOULD PROBABLY AND DIRECTLY RESULT IN THE APPLICATION OF PHYSICAL FORCE OF ANOTHER PERSON. THE PERSON COMMITTING THE ACT WAS AWARE OF FACTS THAT WOULD LEAD A REASONABLE PERSON TO REALIZE IT AS A DIRECT, NATURAL, AND PROBABLE RESULT OF THIS ACT THAT PHYSICAL FORCE WOULD BE APPLIED TO ANOTHER PERSON, AND AT THE TIME THE ACT WAS COMMITTED, THE PERSON COMMITTING THE ACT HAD THE PRESENT ABILITY TO APPLY PHYSICAL FORCE TO THE PERSON OF ANOTHER.

NOW, WHAT DOES THAT MEAN? YOU'VE HEARD A LOT ABOUT WHAT ASSAULT AND BATTERY IS. NOW, IF WE HAVE AN IMAGINARY PERSON SITTING RIGHT HERE, AND I COME UP TO THEM, AND WE'RE NOT JOKING AROUND, AND I COME UP TO THEM AND I HAVE THE PRESENT ABILITY TO HIT THEM, AND I HAVE THIS INTENT TO HIT THEM, THERE'S YOUR ASSAULT. THAT'S IT. THAT'S YOUR BATTERY. BUT ALL YOU HAVE TO DO TO ASSAULT SOMEONE IS ESSENTIALLY HAVE THE ABILITY OR THE MEANS TO COMMIT THAT ASSAULT, LIKE HAVING A SHOTGUN BY YOUR SIDE. AND HOW DO WE KNOW THAT IT'S HIS INTENT TO ACTUALLY POTENTIALLY ASSAULT SOMEBODY WITH THAT? "I'M GOING TO KILL YOU."

SO THE INTENT ISSUE IS USUALLY SOMETIMES DIFFICULT BECAUSE, HOW DO YOU ACTUALLY GET INSIDE THE PERSON'S MIND? THERE'S NO WAY, EVEN IF WE HAD A VIDEOTAPE, THERE'S NO WAY TO GET INSIDE THE PERSON'S MIND TO FIGURE OUT WHAT THEIR INTENT WAS. SO YOU LOOK AT THEIR ACTIONS. THAT'S THE ONLY WAY YOU CAN DO IT. AND YOU LOOK AT THOSE ACTIONS OF THE DEFENDANT, AND HE WALKED UP WITH THAT SHOTGUN, HE WALKED INSIDE THAT RESIDENCE, AND WHETHER YOU BELIEVE HE POINTED IT OR NOT, YOU GOT YOUR ASSAULT WITH A DEADLY WEAPON BECAUSE WE KNOW THAT

THING WAS LOADED AND READY TO GO.

I ALSO HIGHLIGHTED TO CONSTITUTE AN ASSAULT IS NOT NECESSARY THAT ANY ACTUAL INJURY WAS AFFLICTED. THE DEFENSE AT ONE TIME MADE A BIG DEAL OUT OF, "WELL, MR. CASTRO, YOU KNOW, YOU SAY YOU HAD A MARK, BUT THE POLICE DIDN'T SEE A MARK." THE POLICE THAT, OF COURSE, CAME 25 MINUTES AFTER THE INCIDENT OCCURRED WHERE A RED MARK CAN FADE. YOU DON'T HAVE TO HAVE INJURY TO HAVE AN ASSAULT AS I SAID BEFORE. THAT'S NOT THE ASSAULT. THE ASSAULT IS HERE. THE ASSAULT IS HERE, "I'M GOING TO KILL YOU," AND THE ASSAULT IS HERE WHEN YOU PRESS IT UP AGAINST THE FLESH OF ANOTHER PERSON AND THREATEN TO KILL THEM. THAT'S YOUR ASSAULT THERE, THERE, WITH A LOADED WEAPON.

IN ADDITION, NOT TO BELABOR THE POINT AT ALL, LOOKING AT CONDITIONAL THREATS AND HOW THEY TIE IN WITH ASSAULTS, AN ASSAULT INCLUDES A CONDITIONAL THREAT TO APPLY PHYSICAL FORCE UPON ANOTHER IF THAT THREAT COMMANDS THE IMMEDIATE PERFORMANCE OF SOME ACT WHICH THE THREATENING PARTY HAS NO LEGAL RIGHT TO DEMAND. "I'M GOING TO KILL YOU," NOBODY HAS THE RIGHT TO DEMAND THAT. THE THREAT IS MADE WITH THE INTENTION OF COMPELLING PERFORMANCE OF THAT ACT BY THE APPLICATION OF PHYSICAL FORCE. HE'S GOT HIS SHOTGUN. THE PERSON MAKING THE THREAT HAS PLACED HIMSELF PHYSICALLY IN A POSITION TO INFLICT SUCH PHYSICAL FORCE, THAT IS WALKING THROUGH THE DOOR HOLDING THE SHOTGUN OR POINTING IT. AND THAT PERSON HAS PROCEEDED AS FAR AS IT IS NECESSARY TO GO IN ORDER TO CARRY OUT HIS INTENTION. THAT'S AS FAR AS JUST BEING DOWN IN THE PARKING LOT AND POINTING IT UPWARDS AND

SAYING, "I'M GOING TO F-ING KILL YOU." THAT'S ASSAULT WITH A DEADLY WEAPON.

WE'VE GOT ASSAULTS WITH A DEADLY WEAPON ALL OVER THE PLACE. SO WHEN THE DEFENSE COMES UP HERE AND STARTS TALKING ABOUT ASSAULTS WITH A DEADLY WEAPON, THERE ARE MANY DIFFERENT WAYS TO ASSAULT SOMEONE. LUCKILY, FOR THE PROSECUTION'S CASE, THERE ARE MULTIPLE ASSAULTS, MOST OF THEM UPON JOSE CASTRO, THE MOST SERIOUS OF WHICH WE HAVE CHARGED.

THE LAST TWO COUNTS ARE FELON IN POSSESSION OF A FIREARM. THEY'VE ADMITTED TO THAT, WHICH IS ABOUT THE ONLY THING THE DEFENDANT WAS HONEST ABOUT ON THE STAND, THAT HE IS A FELON BECAUSE HE COULD NOT DENY IT, AND THAT HE WAS IN POSSESSION OF A FIREARM BECAUSE WE FOUND THEM IN HIS HOUSE AND THE OFFICERS SAW HIM THROWING A GUN OUT THE WINDOW. THE ONLY THING THIS DEFENDANT WAS HONEST ABOUT WERE THE THINGS THAT HE COULDN'T DENY. AND AS YOU NOTICED, HE CONCOCTED HIS VERY FLIMSY STORY AROUND THAT. BUT WE'LL GET TO THAT IN A SECOND, TOO.

I WANTED TO EXPLAIN THOSE TERMS TO YOU IN CASE THERE WAS ANY CONFUSION. THOSE ARE THE CRIMES IN QUESTION. NOW, WE HAVE TO LOOK AT THE EVIDENCE THAT WE HAVE COME IN. WE START WITH JOSE CASTRO. HE IS A 60-YEAR-OLD MAN WHO GETS UP ON THE STAND AND HAS NO REASON TO LIE. A 60-YEAR-OLD MAN WHO DOESN'T EVEN KNOW THE DEFENDANT, YET SOMEHOW HE'S MADE UP THIS TERRIBLE STORY. HE'S TOLD THE POLICE BACK IN SEPTEMBER, AND THEN CAME UP HERE IN FRONT OF YOU 4 MONTHS LATER AND GAVE HIS STORY VERBATIM WITHOUT ANYBODY SHOWING HIM THE REPORTS OR LISTENING TO THE 911 TAPE. THAT'S AMAZING. THAT'S WHAT

DEFENSE IS CONTENDING, THAT MR. CASTRO GOT UP HERE, MADE UP THIS STORY, AND SOMEHOW WAS ABLE TO REMEMBER WORD FOR WORD FROM THE POLICE REPORT WITHOUT BEING SHOWN THE REPORTS. LADIES AND GENTLEMEN, YOU SAW MR. CASTRO UP THERE. HE'S A SINCERE MAN. HE HAS NO REASON TO LIE.

YOU SAW THE DEFENSE STRUGGLING TRYING TO IMPEACH JOSE CASTRO. BUT IT WASN'T -- HE COULDN'T. THE BEST THING THEY COULD GET OUT OF HIM WAS, "OH, WELL, NOW YOU SAID THAT -- YOU'RE SAYING HERE TODAY IN COURT HE PUSHED YOU TO THE GROUND, BUT IN YOUR REPORT IT SAYS HE PUSHED YOU UP TO THE WALL." WHO CARES? IT DOESN'T MATTER. AND THAT'S THE BEST THE DEFENSE COULD DO AS FAR AS IMPEACHMENT.

AND LET HIM COME UP HERE AND MAKE A BIG DEAL ABOUT MEDICATION. WAS HE ON MEDICATION AT THE TIME? YES, HE TOLD YOU TODAY HE'S BEEN OFF HIS MEDICATION FOR 3 MONTHS. HE SEEMED PRETTY LUCID TO ME. HE SEEMED VERY CLEAR. HE SPOKE CLEARLY. WE UNDERSTOOD HIS ANSWERS. HE UNDERSTOOD BOTH OF OUR QUESTIONS, AND TOLD THE STORY EXACTLY LIKE HE TOLD THE POLICE 4 MONTHS AGO. THAT'S HONEST. THAT'S TRUTHFUL.

AND YOU SAW HIM. HE DIDN'T STUTTER OVER HIS WORDS. HE DIDN'T ASK TO HAVE QUESTIONS, SIMPLE QUESTIONS REPEATED OVER AND OVER AND OVER AGAIN, SIMPLE QUESTIONS THAT COULDN'T BE ANSWERED BY THE DEFENDANT. YET, NONE OF THE OTHER WITNESSES SEEMED TO HAVE TROUBLE BECAUSE THE TRUTH COMES EASY WHEN YOU'RE TELLING IT. WHEN YOU TELL THE TRUTH, IT COMES OUT EASY, IT COMES OUT NATURALLY, AND IT FLOWS. NOBODY HAD PROBLEMS ANSWERING MY QUESTIONS, EXCEPT THE DEFENDANT. NOBODY HAD A PROBLEM ANSWERING MR. GULLEY'S QUESTIONS, EXCEPT

THE DEFENDANT. THAT'S MR. CASTRO.

WE COULD HAVE STOPPED THERE, BUT I HAD A CORROBORATING WITNESS, REBECCA KNOX. SHE WAS LESS THAN 5 FEET AWAY WHEN THIS WHOLE THING HAPPENED. ONCE AGAIN, NEVER SHOWN HER REPORT, TOLD THE POLICE ONE VERY SPECIFIC STORY AND TOLD THE SAME STORY ON THE STAND. DEFENSE HAS TRIED THEIR BEST TO MAKE THIS HUGE RIVALRY BETWEEN THE KNOX'S AND THE DEFENDANT. THEY'RE JUST DISTRACTING YOU. THIS WHOLE TIME THEY'VE BEEN DISTRACTING YOU FROM THE REAL VICTIM, MR. CASTRO. DON'T LOSE SIGHT OF THAT. DON'T DO THAT TO MR. CASTRO. BUT REBECCA KNOX, SHE GETS UP THERE AND SHE TELLS THE TRUTH. ONCE AGAIN, THE DEFENDANT HAD INCREDIBLE -- DEFENSE HAD A DIFFICULT TIME IMPEACHING HER BECAUSE SHE'S TELLING THE TRUTH.

AND WE MOVE RIGHT THERE TO THE 911 TAPE, WHICH YOU CAN TAKE BACK AND LISTEN TO. THAT IS REAL. YOU CAN'T MAKE THAT UP. WAS THERE CUSSING ON IT? YES, THERE WAS. WAS IT AN EXCITED STATE? YES, IT WAS. BOTH REBECCA AND CHRISTOPHER KNOX JUST WATCHED -- WELL, REBECCA WATCHED THE WHOLE THING -- CHRISTOPHER MAYBE THE TAIL END -- JUST WATCHED AS THEIR ROOMMATE HAD A SHOTGUN PUT UP AGAINST HIS NECK AND THROWN UP AGAINST THE WALL. YOU CAN'T FAKE A 911 TAPE.

DEFENSE ATTORNEYS LOVE TO COME IN HERE AND SAY TO JURIES, "WHERE'S THE 911 TAPE," OR, "THEY CALLED AN HOUR LATER," OR, "THEY CALLED A DAY LATER," OR, "THEY REPORTED THIS INCIDENT A WEEK LATER, OR EVEN A MONTH OR TWO MONTHS LATER." THEY'RE NOT GOING TO DO THAT TODAY BECAUSE THIS CRIME WAS REPORTED WHILE IT WAS HAPPENING STILL, WHILE THE DEFENDANT WAS DOWNSTAIRS FLEEING IN HIS CAR BECAUSE HE DIDN'T

WANT TO GET CAUGHT. MORE PROOF THAT THIS HAPPENED. THERE'S A LOT OF PROOF IN THIS CASE. I HAD TO WRITE SOME OF IT DOWN BECAUSE HONESTLY I CAN'T REMEMBER IT ALL. LOTS OF DIRECT, LOTS OF CIRCUMSTANTIAL EVIDENCE, LOTS OF COMBINATION OF BOTH. YOU TAKE YOUR PICK.

WILLIAM BLOOMFIELD, HE GETS ON. HE INDEED CORROBORATES -- HE HAS TO LOCK THE DEFENDANT IN THE STORY BECAUSE THE DEFENDANT AT THIS POINT GOES, "WELL, I GOT TO SAY I HAVE A SHOTGUN NOW BECAUSE, YOU KNOW, THE SECURITY GUARD SAW ME WITH IT." HE SAW HIM COMING DOWN THE STAIRS, HE SAW HIM GET IN HIS CAR, HE SAW HIM PUT THE SHOTGUN IN IT. THAT ALL NOW HAS TO BECOME PART OF THE STORY THAT HE HAS CONCOCTED FOR YOU ON THE STAND TODAY. HE SEES HIM SCREAMING OBSCENITIES.

NINA TALVERA GETS ON THE STAND. SHE SAW A LOT OF THE AFTERMATH. SHE TOLD YOU SHE SAW THE DEFENDANT IN THE PARKING LOT, DIDN'T KNOW WHETHER IT WAS A BAT OR A GUN, AND THAT HE HELD IT UP IN THE AIR. THERE'S YOUR ASSAULT. THERE'S ANOTHER ASSAULT. MORE CORROBORATION.

AND THEN FROM THERE, WE GO TO OFFICER PAZ. WE GO TO OFFICER CHASE, WHO ARE GREAT OFFICERS, DID THEIR JOB, GOT THE CALL OF A MAN -- OF AN AFRICAN-AMERICAN MALE WITH A HAWAIIAN SHIRT. SURE ENOUGH, THEY PICK HIM UP. THEY WATCH AS HE GOES THROUGH A RED LIGHT, WHICH IS YELLOW, OF COURSE, BECAUSE HE KNOWS, EVEN THOUGH HE WAS DRINKING AND UPSET AND ASSAULTING PEOPLE WITH SHOTGUNS, HE'S ABLE TO TELL YOU WHAT COLOR THE LIGHT WAS. RIDICULOUS. OFFICER PAZ AND OFFICER CHASE TELL YOU THEY SEE -- THEY FIND THE TRUCK. HE RUNS A RED LIGHT.

HE THEN THROWS THE SHOTGUN OUT THE WINDOW.

AND THERE WILL BE A JURY INSTRUCTION IN THE LAW THAT YOU'RE GIVEN THAT SAYS YOU'RE ALLOWED TO TAKE INTO CONSIDERATION FLIGHT FROM THE SCENE. THAT'S EXACTLY WHAT HE DID. HE FLED FROM THE SCENE. HE DIDN'T WANT TO GET CAUGHT. THAT'S WHY INSTEAD OF DOING THE LOGICAL THING, GOING BACK DOWN -- FIRST OF ALL, WHY DON'T WE JUST CALL THE POLICE IN THE FIRST PLACE? "HEY, SOMEBODY STOLE MY STUFF. COME ON OVER HERE. LET'S GET SOME PRINTS. MAYBE WE CAN FIGURE IT OUT." NO. NO. INSTEAD, LET'S ACCUSE OUR NEIGHBOR THAT WE HAVE NO EVIDENCE OF STEALING.

AND NOW I'M GETTING INTO THE DEFENDANT'S STATEMENTS -- I JUST KIND OF SEGUED INTO THAT -- WHO TRULY WAS THE BEST WITNESS FOR THE PROSECUTION BECAUSE YOU WILL SEE THAT THESE INSTRUCTIONS ARE LADEN WITH THE WORD REASONABLENESS. IF SOMEBODY BROKE INTO YOUR HOUSE, WHAT DO YOU DO? I GO UP AND ACCUSE THE NEIGHBORS? "WELL, SIR, WHY DID YOU DO THAT? WHAT PROOF DID YOU HAVE PRIOR?" "PRIOR EVENTS. PRIOR EVENTS." "WELL, WHAT ARE YOU TALKING ABOUT? DID YOU SEE THEM AROUND THE HOUSE? DID SOMEBODY TELL YOU THAT THEY BROKE IN?" AND THEN WE HAVE TO FIGURE OUT, "WELL, HOW DID YOU GET UPSTAIRS WITH THE SHOTGUN?" "THEY WERE TAUNTING ME." THE NEIGHBORS JUST ALL OF A SUDDEN DECIDED TO COME OUT, THE KNOXES, AND STARTED TAUNTING HIM AND CALLING HIM NAMES. RIDICULOUS.

AND THEN HE TELLS YOU ABOUT HIS STATE OF MIND. I THINK THAT'S WHAT'S MOST INTERESTING TO ME. AND I SAY INTERESTING, AND I REALLY MEAN UNTRUTHFUL. "WERE YOU ANGRY?" "NO, I WASN'T ANGRY, NO." "WERE YOU MAD?" "I WAS BAFFLED" IT'S

ALMOST LAUGHABLE BECAUSE WHEN SOMEBODY BREAKS INTO YOUR HOUSE, YOU'RE UPSET. AND IF YOU TRULY THINK THE NEIGHBORS ARE TAUNTING YOU AND CALLING YOU THE N WORD, YOU'RE UPSET. AND WHEN YOU DECIDE TO GO TO YOUR CHEST, IF YOU WANT TO BELIEVE THAT EVEN, AND UNLOCK THAT CHEST AND GET THAT SHOTGUN, BAFFLED? "I'M BAFFLED. I'M GOING TO GO UPSTAIRS AND HOLD A SHOTGUN BY MY SIDE." I DON'T MEAN TO BE SARCASTIC, BUT WHAT ELSE CAN YOU GLEAM FROM THAT STORY?

HE MAKES THE DECISION TO OPEN THAT BOX, IF IT EXISTS. WHO KNOWS WHERE THOSE GUNS WERE STREWN ABOUT. HE MAKES THE DECISION TO PICK UP THAT SHOTGUN, AND HE MAKES THAT DECISION TO WALK UPSTAIRS, AND HE WALKED INSIDE THAT DOOR. THERE'S PLENTY OF TESTIMONY ABOUT THAT. HE WALKED INSIDE THAT DOOR AND HE COCKED THAT SHOTGUN, AND HE WAS UPSET, AND HE WAS GOING TO HOLD IT TO ANYBODY'S NECK WHO WAS IN THERE. IT HAPPENED TO BE MR. CASTRO.

"AND THEN, SIR, WHAT DID YOU DO NEXT?" "WELL, I GOT IN MY CAR." "YOU GOT IN YOUR CAR? DID YOU THINK THAT WOULD BE THE LOGICAL THING TO DO?" "WELL, YEAH, SURE IN THIS SITUATION. PUT MY SHOTGUN IN IT, FLEE THE SCENE, RUN A YELLOW LIGHT, AND THEN THROW MY SHOTGUN OUT THE WINDOW." "SIR, BUT YOU COULD HAVE JUST STOPPED YOUR CAR AND PUT YOUR HANDS OUT THE WINDOW." HE WAS TRYING TO GET RID OF EVIDENCE. THE DEFENDANT GOING DOWNSTAIRS AND FLEEING THE SCENE GETTING IN THE CAR AND THROWING A SHOTGUN OUT IS SOMETHING CALLED CONSCIOUSNESS OF GUILT. HE KNOWS HE'S GUILTY SO HE FLEES THE SCENE. HE TRIES TO GET RID OF EVIDENCE.

THAT DEFENDANT TESTIFIED, AND HE -- MOST OF HIS

STATEMENTS WERE WILLFULLY FALSE. AND THERE'S ANOTHER INSTRUCTION WHICH IS IN THERE THAT SAYS IF YOU FIND THAT ANY PART OF THE DEFENDANT'S TESTIMONY IS WILLFULLY FALSE, YOU MAY DISCARD THE ENTIRE TESTIMONY. YOU THROW THAT OUT, WHICH YOU SHOULD, WHICH LEAVES ONLY THE PROSECUTION EVIDENCE AND ONLY ONE RESULT OF GUILTY ON ALL FOUR COUNTS.

ONCE AGAIN WE TALKED A LOT ABOUT CREDIBILITY IN JURY SELECTION. I TALKED ABOUT IT. DEFENSE TALKED ABOUT IT. YOU HAVE TO SEE WHO'S CREDIBLE. THE TRUTH COMES EASY TO THOSE WHO SPEAK IT. NO TRUTHS CAME OUT OF THIS DEFENDANT'S MOUTH EXCEPT THE ONES THAT WERE CONVENIENT FOR HIM. FIND HIM GUILTY OF ASSAULT WITH A DEADLY WEAPON. FIND HIM GUILTY OF BURGLARY OF AN INHABITED DWELLING WITH A FIREARM. AND, OF COURSE, FIND HIM GUILTY OF THE TWO POSSESSIONS OF A SAWED-OFF SHOTGUN, AND FELONY POSSESSION OF A FIREARM. AND THE JUDGE SAID ONE THING. HE SAID I'M GOING TO TRY TO CONVINCE YOU. I'M NOT TRYING TO CONVINCE YOU. THE LAW IS TELLING YOU TO FIND HIM GUILTY.

THANK YOU.

THE COURT: ALL RIGHT. THANK YOU, MR. LINK.

MR. GULLEY.

MR. GULLEY: THANK YOU.

LADIES AND GENTLEMEN, I'LL PULL THIS PODIUM OUT. SO IF YOU GUYS WANT TO STRETCH, TAKE A DEEP BREATH, GET YOUR WIND BACK, THAT'S FINE. I'M NOT GOING TO BE LONG BECAUSE I'M NOT GOING TO TELL YOU WHAT TO THINK LIKE YOU WERE JUST TOLD WHAT TO THINK. I'M JUST GOING TO DISCUSS THE EVIDENCE THE WAY IT CAME OUT AND THE WAY WE SAW IT. THAT'S ALL I'M GOING TO DO.

AS THE JUDGE TOLD YOU, WHAT WE SAY IS NOT EVIDENCE. FOR INSTANCE, WHEN THE DISTRICT ATTORNEY GOT UP IN HIS OPENING STATEMENTS AND SAYS MR. CUNNINGHAM WAS THIS TERRIBLE GUY WHO GRABBED THIS SHOTGUN AND BUSTED IN THIS DOOR WHO POINTED THE GUN AT EVERYBODY AND THREATENED TO KILL EVERYBODY AND THEN RAN DOWN THE STEPS AND JUMPED IN HIS CAR AND DROVE DOWN THE ROAD LIKE A MAD MAN. WELL, THAT WASN'T EVIDENCE BECAUSE IT WASN'T THE TRUTH, OKAY?

YOU HEARD THE TRUTH, AND WHAT YOU HEARD WAS FOR ABOUT 2 YEARS MR. CUNNINGHAM LIVED AT THAT APARTMENT COMPLEX. WHAT YOU HEARD WAS MR. CUNNINGHAM WENT TO WORK EVERYDAY. WHAT YOU HEARD WAS MR. CUNNINGHAM KEPT HIS DAUGHTER ON THE WEEKEND. WHAT YOU HEARD WAS MR. CUNNINGHAM WAS THE TYPE OF GUY WHO WOULD BUILD A GATE FOR A NEIGHBOR SO THEIR NEPHEW COULD PLAY IN THE YARD. WHAT YOU HEARD WAS MR. CUNNINGHAM WAS THE TYPE OF GUY WHO WOULD LEND A NEIGHBOR MONEY. WHAT YOU HEARD WAS HE WAS THE TYPE OF GUY WHO WOULD GIVE A NEIGHBOR RIDES. WHAT YOU HEARD HE WAS THE TYPE OF GUY WHO WOULD GIVE NEIGHBORS FOOD AND CLOTHING FOR THEIR KIDS. THAT'S WHAT YOU HEARD. NOT SOME MANIAC BUSTING IN A HOUSE WITH A SHOTGUN.

WHEN YOU COME IN HERE, WE SAY, "HEY, LEAVE YOUR PREJUDICE. LEAVE YOUR BIAS. LEAVE ALL THAT STUFF OUTSIDE." ONE THING WE DON'T TELL YOU TO LEAVE OUTSIDE IS YOUR COMMON SENSE. THAT'S WHY I'M NOT GOING TO TELL YOU WHAT TO THINK. USE YOUR COMMON SENSE. APPLY IT TO THE FACTS IN THIS CASE. USE YOUR COMMON SENSE AND COMPARE THE WITNESSES IN THIS CASE.

YOU HEARD ABOUT MR. CUNNINGHAM. 2 YEARS, NO PROBLEMS IN THIS COMPLEX. LIKED BY THE NEIGHBORS, GETS ALONG WITH THE

SECURITY GUARD. LET'S CONTRAST THAT TO THE KNOXES. WELL, YOU HAVE CHRISTOPHER KNOX, WHO MS. NINA TALVERA SAID -- HER MOTHER'S THE APARTMENT MANAGER -- CUSSES AT HER MOM AND CALLS HER MOM BAD NAMES ALL THE TIME. YOU HAVE REBECCA KNOX WHO HAS A SMALL CHILD, YET SHE LET THREE OTHER PEOPLE LIVE IN HER TWO BEDROOM, ONE BATH, APARTMENT, WHICH ONE OF THE WITNESSES, MR. CASTRO, CALLED FILTHY. THAT'S THE PERSON THE DISTRICT ATTORNEY WANTS YOU TO RELY ON VERSUS THIS GUY WHO GETS UP EVERY MORNING LIKE US AND GOES TO WORK. BUT THAT'S THE ONE THAT HE WANTS YOU TO BASE IT ON, THIS WOMAN.

THEN YOU HAVE MR. CASTRO WHO CALLS HIMSELF 5150 WHO SAYS, "WELL, I GOT A MENTAL DISORDER, AND I HAVE DELUSIONS" AND, IN FACT, ONE OF HIS DELUSIONS WAS THIS TYPE OF THING THAT HAPPENED TO HIM.

MR. LINK: OBJECTION. MISSTATES EVIDENCE.

THE COURT: OVERRULED.

MR. GULLEY: AND, AGAIN, IF I MISSTATE EVIDENCE, YOU HAVE YOUR OWN NOTES. I RECALL HIM SAYING THAT SPECIFICALLY. I ASKED HIM I SAID, "SO DO YOU HAVE DELUSIONS THAT PEOPLE ARE COMING IN JUST LIKE THEY DID IN THIS CASE?" HE SAID, YES, HE'S PARANOID PEOPLE ARE CHASING AFTER HIM. BUT THAT'S THE TESTIMONY HE WANTS YOU TO RELY ON. USE YOUR COMMON SENSE. SIT HERE -- WHETHER WE SAY NOTHING, LOOK AT WHAT YOU HAVE IN FRONT OF YOU. LOOK AT WHO TESTIFIED, AND DO THE RIGHT THING. THAT'S ALL I'M ASKING YOU TO DO. FOLLOW THE LAW AND DO THE RIGHT THING.

NOW, HE SAYS, "WELL, MR. CASTRO HAS NO MOTIVE TO TELL THE TRUTH" -- I MEAN -- "TO TELL A LIE." WELL, INTERESTINGLY, MR. CASTRO IS NOT ON THAT 911 TAPE. WHAT YOU HEAR FIRST IS CHRISTOPHER KNOX WHO DOESN'T SAY ANYTHING ABOUT SOMETHING HAPPENING TO MR. CASTRO. AND THEN YOU HAVE REBECCA WHO IS ON THERE AND SHE SAYS, "HE SLAMMED MY 60-YEAR-OLD ROOMMATE DOWN TO THE GROUND." NOW, IS IT POSSIBLE THAT MR. CASTRO HEARD THAT AND JUST ACCEPTED IT? "OKAY. THAT'S WHAT THEY SAID HAPPENED TO ME. THAT'S WHAT HAPPENED TO ME." IF IT'S GOING TO MAKE THE PLACE WHERE I STAY AVAILABLE TO ME, THEN THAT'S WHAT I'LL SAY, JUST LIKE IF THE D.A. PUT ME UP IN A HOTEL ROOM FOR FIVE DAYS, I'LL SAY WHATEVER HE WANTS ME TO SAY.

WHY WOULD REBECCA HAVE A MOTIVE? WELL, SHE LET IT SLIP OUT, AND SHE LET IT SLIP OUT BY ACCIDENT. SHE SAID, "WELL, FOR A LITTLE WHILE, I THOUGHT THAT MAYBE MR. CUNNINGHAM HAD MORE OR LESS SNITCHED US OUT, HAD REPORTED TO THE MANAGERS THAT WE HAD A LOT OF STUFF GOING ON HERE THAT GOT US KICKED OUT OF OUR APARTMENT. SO MAYBE I WAS A LITTLE MAD ABOUT THAT." THAT'S BULL. SHE WAS MAD ABOUT THAT, AS WAS CHRISTOPHER. THEY KNOW MR. CUNNINGHAM HAD SOMETHING TO DO WITH THEM BEING KICKED OUT OF THAT APARTMENT COMPLEX, AND THEY WANTED SOME TYPE OF REVENGE. NEVER MIND THE FACT THAT SHE OWED HIM MONEY. BUT REMEMBER WHAT MY CLIENT SAID? THEY WAS CALLING HIM, "YOU SNITCH. YOU SNITCHED US OFF. YOU SNITCH." THAT WAS PART OF THE BERATING HE WAS TALKING ABOUT.

IN TERMS OF THE CRIMES AGAINST HIM, LADIES AND GENTLEMEN, AGAIN, I'M NOT GOING TO BELABOR EVERYBODY'S TESTIMONY AND EVERY LITTLE FACT THAT THEY SAID BECAUSE I JUST WANT YOU TO USE YOUR COMMON SENSE. BUT THE CRIME OF BURGLARY

INVOLVES MY CLIENT GOING INTO THE APARTMENT WITH THE INTENT TO COMMIT AN ASSAULT. ASSUMING THAT HE DID GO INTO THE APARTMENT, THE QUESTION IS, WHEN HE CROSSED THAT THRESHOLD, WHAT WAS IN HIS MIND? WELL, WHAT WAS THEIR TESTIMONY? HE SAYS, "I WANT MY PROPERTY BACK. I WANT MY PROPERTY BACK." THE GUN WAS SUPPOSEDLY AT HIS SIDE. "I WANT MY PROPERTY BACK." ASKING FOR YOUR OWN PROPERTY IS NOT A CRIME. IT'S SOMETHING THAT WE DO. SOMEBODY'S GOT SOMETHING OF OURS, WE ASK FOR IT BACK. HOPEFULLY, IT'S NOT A NEIGHBOR WHO BREAKS IN YOUR HOUSE AND STEALS THE STUFF. BUT HE WENT IN AND HE ASKED FOR IT BACK. THE MOMENT HE WENT IN THERE AND ASKED FOR HIS PROPERTY BACK, HE NEVER POINTED THE GUN, ACCORDING TO THEIR TESTIMONY, THAT MAKES HIM NOT GUILTY OF THE CHARGE OF BURGLARY BECAUSE HE DID NOT ENTER THE HOUSE WITH AN INTENT TO COMMIT A CRIME.

WHY DID HE HAVE THE GUN WITH HIM? WELL, HE TOLD YOU A FEW MONTHS AGO MR. KNOX HAD THREATENED HIM A BAT. HE JUST WANTED TO PROTECT HIMSELF AND MAKE SURE NOTHING HAPPENED. IT IS INTERESTING THAT THIS MAD MAN, THIS GUY WHO IS IN HERE WHO IS SWINGING HIS GUN AROUND, WHO'S THREATENING EVERYBODY, CALMLY WALKED DOWN THE STEPS, ACCORDING TO MR. BLOOMFIELD, THE SECURITY GUARD, CALMLY WALKED OUT TO HIS CAR, CALMLY GETS IN HIS CAR AND DRIVES AWAY. SO HE'S A MANIAC ONE SECOND FOR THE D.A., THEN HE'S NICE AND CALM THE SECOND WHICH WAS JUST ACTUALLY SHOWN. I SUBMIT TO YOU HE WAS NOT A MANIAC, THAT HE WENT IN THERE, HE ASKED THEM FOR HIS PROPERTY, THAT THEY GOT UPSET, THEY STARTED YELLING AND SCREAMING AT HIM, AND KNOX CAME OUT WITH A BAT, AND HE SAYS, "WHOA. WHOA. THIS IS

GETTING TOO FAR OUT OF LINE. LET'S GET OUT OF HERE. LET ME LEAVE," AND HE LEFT.

HE WASN'T RUNNING FROM ANYBODY. THE POLICE CAUGHT HIM LESS THAN 5 MINUTES LATER. THEY FOLLOWED HIM LESS THAN A MINUTE. IT'S ON THAT VIDEOTAPE. YOU CAN SEE THE COUNTDOWN. IT WAS LESS THAN A MINUTE FOR THE LIGHTS TO BE TURNED ON FOR HIM TO STOP. HE THROWS THE GUN OUT THE WINDOW. YOU WATCH THE VIDEOTAPE. YOU CAN SEE HIM GET OUT OF THE CAR WITH HIS HANDS UP. YOU CAN SEE HIM WALK CALMLY OVER AND GIVE HIMSELF UP. THIS IS THE MAD MAN HE WANTS YOU TO BELIEVE THAT WAS OUT THERE. IT'S JUST NOT SO. USE YOUR COMMON SENSE.

LADIES AND GENTLEMEN, I'VE GOT THIS PEN. I HAD THIS PEN. THIS PEN GOT A POINT. THIS PEN IS A DANGEROUS WEAPON IF I STAB YOU WITH IT. THE SIMPLE FACT I GOT THIS PEN DOESN'T MAKE ME GUILTY OF ASSAULT WITH A DEADLY WEAPON. I'M NOT POINTING IT AT YOU. I'M NOT TRYING TO HIT YOU WITH IT. I'M NOT TRYING TO STAB YOU WITH IT. IT TAKES MORE THAN WHAT HE TOLD YOU. THE SIMPLE FACT THAT MY CLIENT HAD THAT GUN ON HIS SIDE DOES NOT MAKE HIM GUILTY OF ASSAULT.

IF HE POINTED IT AT SOMEONE, IF HE HIT SOMEBODY WITH IT, IF HE KNOCKED MR. CASTRO DOWN, THEN HE IS. BUT THERE'S NO EVIDENCE THAT HE DID ANY OF THOSE. IN FACT, THE EVIDENCE IS OPPOSITE, THAT HE KEPT IT AT HIS SIDE EXCEPT FOR THE ONE POINT THAT HE WAS GOING DOWN THE STEPS AND HE POINTED IT UP IN THE AIR. THAT'S NOT AN ASSAULT. THAT'S A MISTAKE.

MR. LINK IS RIGHT, WE'RE NOT GOING TO ARGUE COUNT 3 AND 4. MY CLIENT HAD A GUN. BE IT RIGHT, BE IT WRONG, HE HAD A GUN. I'LL BE FOOLISH TO GET UP HERE AND SAY HE DIDN'T HAVE A

GUN. THEY WERE THERE. SO I'M NOT GOING TO EVEN BELABOR THAT POINT. YES, HE'S GUILTY OF THAT CHARGE, AND, YES, THE GUN WAS LESS THAN 26 INCHES AS REQUIRED BY LAW. THAT'S WHAT HE'S GUILTY OF. THAT'S WHAT YOU SHOULD FIND HIM GUILTY OF.

AS TO COUNTS 1 AND 2, I ASK, JUST USE YOUR COMMON SENSE. JUST LOOK AT WHAT WAS TESTIFIED TO YOU, AND FIND HIM NOT GUILTY OF BOTH COUNTS 1 AND 2. THAT'S THE RIGHT THING TO DO IN THIS CASE.

THANK YOU.

THE COURT: ALL RIGHT. THANK YOU, MR. GULLEY.

YOUR REBUTTAL ARGUMENT, MR. LINK.

MR. LINK: THANK YOU, YOUR HONOR.

THAT'S A VERY GOOD DEFENSE TACTIC TO GIVE UP TWO CHARGES AND SAY, "HEY, WE'RE GOING TO GIVE UP THESE TWO, BUT DON'T FIND MY CLIENT GUILTY OF THESE TWO. COME ON. FORGIVE HIM FOR THESE TWO." DO NOT BE FOOLED BY THAT.

ALL RIGHT, LADIES AND GENTLEMEN, HE'S RIGHT. THIS PEN WHEN HELD IN THE HAND IS NOT A DANGEROUS WEAPON. BUT WHEN IT'S HELD LIKE THIS, AND I SAY, "I'M GOING TO F-ING KILL YOU," OR IF IT'S A KNIFE, OR IN THIS CASE IT'S A SHOTGUN, YOU NOW HAVE AN ASSAULT.

I'LL BE VERY BRIEF. EVERYTHING YOU HEARD -- MOST OF THE STUFF YOU JUST HEARD FROM THE DEFENSE WAS A LOT OF FLUFF. "FEEL SORRY FOR MY CLIENT. HE'S A GOOD GUY." IT'S NOT WHAT THIS IS ABOUT. I'M SURE HE IS A GOOD GUY AT CERTAIN STAGES OF HIS LIFE. THAT DOESN'T COME INTO YOUR THINKING. AND WHETHER YOU WANT TO CALL IT A MAD MAN, OR DOING A REALLY STUPID THING, IT DOESN'T CHANGE. IT DOESN'T MAKE A

DIFFERENCE.

HE ALSO SAID HE GETS ALONG WITH SECURITY GUARDS. WELL, I DON'T KNOW WHERE THESE MULTIPLE SECURITY GUARDS CAME FROM BUT I HEARD ONE ON THE STAND, AND I DON'T REMEMBER HIM SAYING THEY WERE BUDDY BUDDY AND GOT ALONG OR ANYTHING LIKE THAT. SO I'M NOT SURE WHERE THAT CAME FROM.

AND HE SAYS, "YOU KNOW WHAT? HE WENT BACK UPSTAIRS TO GET HIS PROPERTY, YOU KNOW, LIKE WE ALL DO." NO, WE ALL DON'T DO THAT. WE ALL DON'T GET SHOTGUNS AND GO UP TO OUR NEIGHBOR'S HOUSE AND THREATEN THEM, THREATEN TO KILL THEM, WALK INSIDE AND THREATEN TO KILL THEM TO GET THEIR STUFF BACK, STUFF WHICH BY THE WAY, I FORGOT TO SAY IN THE FIRST PART, WHERE IS THAT STUFF? WHY DIDN'T HE TELL THE POLICE, "HEY, THESE GUYS STOLE MY STUFF AND I WENT UP TO GET" -- YOU DIDN'T HEAR ANY OF THAT. ALL THE LOGICAL THINGS THE DEFENDANT COULD HAVE DONE, HE DIDN'T DO BECAUSE HE'S NOT TELLING THE TRUTH AND BECAUSE HE'S COMMITTED THIS CRIME.

HE SAID ONE MORE THING, ABOUT TWO MONTHS AGO HE POTENTIALLY HAD A CONFRONTATION WITH MR. KNOX WITH A BAT. SO SOMEHOW THAT GIVES YOU A RIGHT TO GRAB A SHOTGUN AND ACCUSE HIM OF STEALING YOUR STUFF TWO MONTHS LATER. PLEASE USE YOUR COMMON SENSE. AND DON'T FEEL SORRY FOR THE DEFENDANT LIKE THE DEFENSE WOULD LIKE YOU TO, BECAUSE I KNOW WHO DOESN'T, AND THAT'S JOSE CASTRO. AND IF YOU FEEL SORRY FOR THE DEFENDANT, YOU CAN THINK OF JOSE CASTRO SITTING THERE WITH A TELEPHONE IN HIS HAND, THE CORDLESS PHONE, A 60-YEAR-OLD MAN HOPING TO GOD THAT THE STEEL PLACED UP AGAINST HIS NECK DOESN'T EXPLODE. WE'RE NOT HERE TO FEEL SORRY FOR ANYONE.

WE'RE HERE TO TAKE THE FACTS WHICH ARE CLEAR AS DAY AND PUT THEM IN THE LAW AND COME UP WITH A RIGHT ANSWER, WHICH IS GUILTY.

YOU'LL GET A CIRCUMSTANTIAL EVIDENCE INSTRUCTION, AND IT WILL TELL, YOU IF YOU HAVE TWO EXPLANATIONS, ONE WHICH IS REASONABLE, AND ONE WHICH IS UNREASONABLE, YOU MUST REJECT THE UNREASONABLE AND YOU MUST ACCEPT THE REASONABLE. THERE'S ONLY ONE REASONABLE EXPLANATION THAT'S BEEN GIVEN TO YOU HERE TODAY IN COURT BY THE EVIDENCE. COME BACK GUILTY ON ALL FOUR COUNTS.

THANK YOU FOR YOUR TIME.

THE COURT: ALL RIGHT. THANK YOU, MR. LINK.

CAN I ASK BOTH COUNSEL TO APPROACH SIDEBAR.

(SIDEBAR CONFERENCE, NOT REPORTED.)

THE COURT: AND JUST FOR THE RECORD, THERE WAS ONE ADDITIONAL INSTRUCTION THAT I JUST DISCUSSED WITH THE ATTORNEYS THAT THE COURT WILL GIVE. IT IS CALJIC 17.01, AND BOTH ATTORNEYS HAVE AGREED TO IT.

"THE DEFENDANT IS ACCUSED OF HAVING COMMITTED THE CRIME OF ASSAULT WITH A FIREARM IN COUNT 2. THE PROSECUTION HAS INTRODUCED EVIDENCE FOR THE PURPOSE OF SHOWING THAT THERE IS MORE THAN ONE ACT UPON WHICH A CONVICTION ON COUNT 2 MAY BE BASED. DEFENDANT MAY BE FOUND GUILTY IF THE PROOF SHOWS BEYOND A REASONABLE DOUBT THAT HE COMMITTED ANY ONE OR MORE OF THE ACTS. HOWEVER, IN ORDER TO RETURN A VERDICT OF GUILTY TO COUNT 2, ALL 12 JURORS MUST AGREE THAT HE COMMITTED THE SAME ACT. IT IS NOT NECESSARY THAT THE PARTICULAR ACT AGREED UPON BE STATED IN YOUR VERDICT."

NOW, LET ME EXPLAIN WHAT THAT MEANS. YOU'VE HEARD EVIDENCE OF CERTAIN EVENTS THAT OCCURRED INSIDE THE APARTMENT. YOU'VE ALSO HEARD EVIDENCE, I BELIEVE, OF THE DEFENDANT HOLDING THE GUN IN A CERTAIN MANNER WHILE HE WAS DOWNSTAIRS, I THINK, IN THE PARKING LOT. THE PROSECUTION HAS ARGUED THAT EITHER ONE OF THOSE EVENTS COULD SUPPORT A CONVICTION FOR COUNT 2. WHAT THIS INSTRUCTION MEANS IS THAT ALL 12 OF YOU JUST AGREE ON WHICH EVENT OR ACT OCCURRED BEFORE YOU CAN FIND THE DEFENDANT GUILTY.

IF, FOR EXAMPLE, 6 JURORS FEEL THAT WHAT HAPPENED IN THE APARTMENT IS SUFFICIENT FOR A GUILTY OF COUNT 2, BUT NOT WHAT HAPPENED DOWNSTAIRS, AND THE OTHER 6 THINK DOWNSTAIRS BUT NOT WHAT HAPPENED UP IN THE APARTMENT, YOU CAN'T GO 6 PLUS 6 TO MAKE 12. ALL 12 OF YOU HAVE TO AGREE THAT THE DEFENDANT COMMITTED THE SAME ACT IN ORDER TO FIND HIM GUILTY OF COUNT 2. YOU CAN'T GO 6 AND 6 OR 8 AND 4.

"I HAVE NOT INTENDED BY ANYTHING I HAVE SAID OR DONE OR BY ANY QUESTIONS I MAY HAVE ASKED OR BY ANY RULING I MAY HAVE MADE TO INTIMATE OR SUGGEST WHAT YOU SHOULD FIND TO BE THE FACTS, OR THAT I BELIEVE OR THAT I DISBELIEVE ANY WITNESS. IF ANYTHING I HAVE DONE OR SAID HAS SEEMED TO SO INDICATE, YOU WILL DISREGARD IT AND FORM YOUR OWN CONCLUSION.

THE PURPOSE OF THE COURT'S INSTRUCTIONS IS TO PROVIDE YOU WITH THE APPLICABLE LAW SO YOU MAY ARRIVE AT A JUST AND LAWFUL VERDICT. WHETHER SOME INSTRUCTIONS APPLY WILL DEPEND UPON WHAT YOU FIND TO BE THE FACTS. DISREGARD ANY INSTRUCTION WHICH APPLIES TO FACTS DETERMINED BY YOU NOT TO EXIST. DO NOT CONCLUDE THAT JUST BECAUSE AN INSTRUCTION HAS

BEEN GIVEN I AM EXPRESSING AN OPINION AS TO THE FACTS.

THE PEOPLE AND THE DEFENDANT ARE ENTITLED TO THE INDIVIDUAL OPINION OF EACH JUROR. EACH OF YOU MUST CONSIDER THE EVIDENCE FOR THE PURPOSE OF REACHING A VERDICT IF YOU CAN DO SO, AND EACH OF YOU MUST DECIDE THE CASE FOR YOURSELF, BUT SHOULD DO SO ONLY AFTER DISCUSSING THE EVIDENCE AND INSTRUCTIONS WITH THE OTHER JURORS.

DO NOT HESITATE TO CHANGE AN OPINION IF YOU ARE CONVINCED IT IS WRONG. HOWEVER, DO NOT DECIDE ANY QUESTION IN A PARTICULAR WAY BECAUSE THE MAJORITY OF THE JURORS OR ANY OF THEM FAVOR THAT DECISION. DO NOT DECIDE ANY ISSUE IN THIS CASE BY THE FLIP OF A COIN OR BY ANY OTHER CHANCE DETERMINATION.

THE ATTITUDE AND CONDUCT OF JURORS AT ALL TIMES ARE VERY IMPORTANT. AS I THINK I SAID A COUPLE OF DAYS AGO, IT IS RARELY HELPFUL FOR A JUROR AT THE BEGINNING OF DELIBERATIONS TO GO IN THERE AND EXPRESS AN EMPHATIC OPINION ON THE CASE, OR TO ANNOUNCE A DETERMINATION TO STAND FOR OR AGAINST A VERDICT. WHEN ONE DOES THAT AT THE OUTSET, A SENSE OF PRIDE MAY BE AROUSED, AND ONE MAY HESITATE TO CHANGE A POSITION EVEN IF SHOWN IT IS WRONG. REMEMBER YOU'RE NOT PARTISANS OR ADVOCATES IN THIS MATTER. YOU ARE IMPARTIAL JUDGES OF THE FACTS.

IN YOUR DELIBERATIONS DO NOT DISCUSS AND DO NOT CONSIDER THE SUBJECT OF PENALTY OR PUNISHMENT. THAT SUBJECT MUST NOT IN ANYWAY AFFECT YOUR VERDICTS.

LET ME TELL YOU ONE OTHER SUBJECT THAT YOU MUST NOT DISCUSS OR SPECULATE ABOUT IN YOUR DELIBERATIONS. YOU HAVE

HEARD EVIDENCE BECAUSE IT'S BEEN STIPULATED TO THAT MR. CUNNINGHAM HAS BEEN CONVICTED OF A FELONY. YOU'VE BEEN GIVEN INSTRUCTIONS INDICATING THAT YOU CAN CONSIDER THAT IN ASSESSING HIS CREDIBILITY AS A WITNESS, AND YOU'VE ALSO BEEN INSTRUCTED THAT IT COMPRISES AN ELEMENT OF ONE OF THE CRIMES CHARGED, I BELIEVE, IN COUNT 3. YOU HAVE NOT BEEN TOLD, AND YOU WILL NOT BE TOLD, THE NATURE OF THAT FELONY BECAUSE UNDER THE LAW, IT IS IRRELEVANT. YOU MAY NOT SPECULATE ABOUT IT, AND YOU MAY NOT TALK ABOUT THAT IN THE JURY ROOM. ANY JUROR WHO DOES IS ENGAGING IN IMPROPER DELIBERATIONS AND MAY NOT DO SO. DO NOT SPECULATE AS TO THE NATURE OF THE FELONY. UNDER THE LAW, IT IS IRRELEVANT.

DURING DELIBERATIONS, ANY QUESTION OR REQUEST YOU MAY HAVE SHOULD BE ADDRESSED TO THE COURT ON A FORM THAT WILL BE PROVIDED.

IF THERE IS ANY DISAGREEMENT AS TO THE ACTUAL TESTIMONY, YOU HAVE THE RIGHT, IF YOU CHOOSE, TO REQUEST A READBACK BY THE REPORTER. NOW, IF YOU DO REQUEST A READBACK, I'LL TELL YOU FOR THE UMPTEENTH TIME, IT WILL BE A FULL READBACK OF ALL OF THE TESTIMONY OF THAT PARTICULAR WITNESS. IF A READBACK IS REQUESTED, THE REPORTER WILL DELETE OBJECTIONS, RULINGS, AND SIDEBAR CONFERENCES SO THAT YOU WILL HEAR ONLY THE EVIDENCE THAT WAS ACTUALLY PRESENTED.

PLEASE UNDERSTAND THAT THE ATTORNEYS MUST FIRST BE CONTACTED BEFORE I CAN PROVIDE YOU WITH ANY RESPONSE TO ANY OF YOUR QUESTIONS. THEY'RE NOT GOING TO BE SITTING HERE IN THE COURTROOM WHILE YOU DELIBERATE. IT MAY TAKE SEVERAL HOURS OR DAYS FOR YOU TO REACH VERDICTS, I DON'T KNOW.

THEY'LL BE OFF DOING OTHER THINGS IN OTHER COURTROOMS. SO IT'S GOING TO TAKE TIME FOR ME TO GIVE YOU A RESPONSE. PLEASE CONTINUE DELIBERATING IF YOU'RE ABLE TO DO SO UNTIL YOU DO RECEIVE ONE.

THE INSTRUCTIONS I AM NOW GIVING TO YOU WILL BE GIVEN TO YOU IN WRITTEN FORM DURING YOUR DELIBERATIONS. THEY MUST NOT BE DEFACED IN ANYWAY. THAT MEANS PLEASE DON'T WRITE ON THEM. PLEASE DON'T WRITE NOTES ON THEM. THE INSTRUCTIONS ARE FOR THE MOST PART PRINTED OR TYPED. THERE IS SOME PORTIONS THAT ARE DELETED, SOME PORTIONS THAT ARE HANDWRITTEN IN. THERE ARE SOME INSTRUCTIONS THAT HAVE DIFFERENT HEADINGS OR COMPUTER FACES, WHATEVER YOU CALL IT. THEY LOOK A LITTLE DIFFERENT THAN OTHERS. DON'T ALLOW ANY OF THOSE THINGS TO BE OF CONCERN. DON'T SPECULATE AS TO WHY -- THESE INSTRUCTIONS BASICALLY ARE TAILORED TO THIS CASE, BUT THEY DO COME OUT OF A BOOK CALLED CALJIC, CALIFORNIA JURY INSTRUCTIONS CRIMINAL, AND FOR EACH CASE WE HAVE TO KIND OF TAYLOR THEM IN ONE RESPECT OR ANOTHER. SO THAT'S WHY YOU'RE GOING TO SEE SOME DELETIONS OR HANDWRITTEN PORTIONS.

EVERY PART OF THE TEXT OF AN INSTRUCTION, WHETHER IT'S TYPED, PRINTED, OR HANDWRITTEN, IS OF EQUAL IMPORTANCE. YOU ARE TO BE GOVERNED ONLY BY THE INSTRUCTIONS IN IT'S FINAL WORDING.

DO NOT DISCLOSE TO ANYONE OUTSIDE THE JURY, NOT EVEN TO ME OR ANY MEMBER OF MY STAFF, EITHER ORALLY OR IN WRITING, HOW YOU MAY BE DIVIDED NUMERICALLY IN YOUR BALLOTING AS TO ANY ISSUE UNLESS I SPECIFICALLY DIRECT OTHERWISE. WHAT DOES THAT MEAN IN PLAINER ENGLISH? WELL, IT MEANS THIS. LET'S

SAY YOU'VE REACHED THE POINT SOME TIME TOMORROW WHERE YOU ARE UNABLE TO REACH A UNANIMITY ON A PARTICULAR COUNT. YOU MAY INFORM THE COURT THAT YOU DON'T BELIEVE YOU CAN REACH A VERDICT ON THAT COUNT, BUT YOU SHOULD NOT GIVE ME ANY KIND OF NUMERICAL BREAKDOWN OR WHICH WAY YOU'RE LEANING. DON'T TELL ME 6 TO 6, OR 11 TO 1, OR ANYTHING LIKE THAT. JUST TELL ME THAT YOU DON'T BELIEVE THAT YOU CAN REACH A VERDICT IF THAT'S WHAT YOUR FEELING IS.

YOU SHALL NEW RETIRE SELECT ONE OF YOUR NUMBER TO ACT AS FOREPERSON. THAT PERSON WILL PRESIDE OVER YOUR DELIBERATIONS. NOW, IN ORDER TO REACH A VERDICT ON A PARTICULAR COUNT, ALL 12 JURORS MUST AGREE TO THAT DECISION. AS SOON AS ALL OF YOU HAVE AGREED UPON A VERDICT SO THAT WHEN POLLED EACH MAY STATE TRUTHFULLY THAT THE VERDICTS EXPRESS YOUR PARTICULAR VOTE, HAVE THE VERDICT FORMS DATED AND SIGNED BY THE FOREPERSON AND RETURN WITH THEM TO THIS COURTROOM. ALSO, RETURN ANY UNSIGNED VERDICT FORMS.

NOW, I'VE PUT A LITTLE YELLOW STICKY ON THE FACE OF EACH OF THE FIVE VERDICT FORMS. AND THERE ARE FIVE BECAUSE ALTHOUGH THERE ARE ONLY FOUR COUNTS CHARGED, REMEMBER THAT LESSER INCLUDED OFFENSE ON COUNT 2 ALSO HAS IT'S OWN VERDICT FORM, AND I'VE SO LABELED IT.

THERE IS A VERDICT FORM FOR COUNT 1 THAT I'M HOLDING UP NOW, AND THERE'S A LITTLE PLACE FOR YOU TO WRITE IN EITHER GUILTY OR NOT GUILTY. AND, THEN, IF YOU'LL RECALL, THERE'S AN ALLEGATION THAT YOU HAVE TO MAKE A DECISION ON WHETHER OR NOT IF THERE WAS A BURGLARY THAT IT WAS A BURGLARY OF AN INHABITED DWELLING HOUSE. SO IF YOU SHOULD FIND THE

DEFENDANT GUILTY OF COUNT 1, YOU THEN NEED TO TELL US WHETHER IT WAS OR WAS NOT AN INHABITED DWELLING HOUSE. YOU NEED TO TELL US WHETHER OR NOT THERE WERE PEOPLE PRESENT IN THE RESIDENCE DURING THE BURGLARY IF YOU FIND THE DEFENDANT GUILTY, AND FINALLY YOU NEED TO TELL US DID OR DID NOT THE DEFENDANT PERSONALLY USE A FIREARM DURING THE COMMISSION OF THE BURGLARY. IF YOU FIND HIM NOT GUILTY OF A BURGLARY, THEN YOU DON'T NEED TO FILL IN ANY OF THESE OTHER ALLEGATION LINES. IF IT'S NOT GUILTY, THEN JUST LEAVE THESE OTHER THREE BLANK.

NOW, I TOLD YOU I'D GIVER YOU A QUICK PRIMER ON THAT LESSER INCLUDED OFFENSE ISSUE AGAIN. ONCE AGAIN, IT'S CALJIC 17.12. IT GIVES YOU THE PROCEDURE TO USE. BUT REMEMBER WHAT I SAID. THE SIMPLEST WAY FOR ME TO THINK ABOUT IT IS THAT THERE ARE THREE POSSIBLE THINGS THAT CAN HAPPEN ON COUNT 2, AND, FRANKLY, WITH ANY OTHER COUNT. YOU CAN FIND THE DEFENDANT GUILTY, YOU CAN FIND HIM NOT GUILTY, OR YOU CAN FAIL TO COME UP WITH A UNANIMOUS VERDICT. ONLY THOSE THREE THINGS CAN HAPPEN.

ONLY IF YOU FIND HIM NOT GUILTY ON THE CHARGED OFFENSE OF ASSAULT WITH A FIREARM, ONLY IF HE'S FOUND NOT GUILTY ON THAT, CAN I THEN ACCEPT A VERDICT OF EITHER GUILTY OR NOT GUILTY ON THE LESSER OFFENSE OF SIMPLE ASSAULT. IF HE'S FOUND GUILTY OF THAT CHARGED OFFENSE, YOU WRITE IN GUILTY. AND THERE'S ALSO AN ALLEGATION TO FILL IN THERE REGARDING WHETHER HE PERSONALLY USED A SHOTGUN. IF YOU FIND HIM GUILTY OF THAT ONE, YOU FILL IN THAT VERDICT FORM AND LEAVE THIS ONE BLANK. IF YOU CAN'T COME UP WITH A VERDICT ON THIS ONE, COUNT 2, YOU LEAVE IT BLANK, AND YOU LEAVE THIS ONE BLANK. ONLY IF HE'S NOT GUILTY ON COUNT 2 CAN I THEN ACCEPT A VERDICT ON THE LESSER INCLUDED OFFENSE. AND I'VE GOT THE COUNTS 3 AND 4 LABELED WITH THE LITTLE YELLOW STICKYS AS WELL, SO YOU DON'T HAVE TO WORRY ABOUT WHICH ONE APPLIES TO WHICH.

YOU WILL BE PERMITTED TO SEPARATE AT NORMAL TIMES FOR RECESSES. THE TIMES OF YOUR RECESS AND WHEN YOU TAKE THEM WILL BE UP TO THE BAILIFF. HE'LL BE IN CHARGE OF YOU DURING YOUR DELIBERATIONS. DURING YOUR ABSENCE, THE COURTROOM WILL BE OFF LIMITS TO YOU. YOU ARE TO RETURN FOLLOWING RECESSES TO THE PLACE AND AT THE TIME THAT DEPUTY WAITE, OR ANYONE SUBBING IN FOR HIM, TELLS YOU TO.

DURING PERIODS OF RECESSES, YOU MUST REMEMBER THAT YOU ARE NOT TO DISCUSS WITH ANY PERSON ANY SUBJECT CONNECTED WITH THE TRIAL. YOU MUST NOT DELIBERATE FURTHER UPON THE CASE UNTIL ALL 12 OF YOU ARE TOGETHER AND REASSEMBLED IN THE JURY ROOM. THAT MEANS THAT DURING A COFFEE BREAK, ONCE AGAIN, EVEN THOUGH YOU'RE IN DELIBERATIONS, THOSE DELIBERATIONS CEASE UNTIL ALL 12 OF YOU ARE PRESENT IN THE JURY ROOM.

NOW, I HAVE A SEPARATE INSTRUCTION FOR THE ALTERNATE JURORS. IF YOU TWO LADIES WILL JUST REMAIN SEATED WHILE THE OTHER 12 LEAVE THE COURTROOM. AND AT THIS POINT, I'LL ASK THE CLERK TO PLEASE SWEAR THE BAILIFF.

(WHEREUPON THE BAILIFF WAS DULY SWORN.)

THE COURT: OKAY. ONE OTHER THING I FORGOT. IF YOU WANT OR NEED TO SEE THE GUNS, YOU ASK THE BAILIFF THAT YOU WANT TO SEE THE GUNS, AND HE WILL BRING THEM IN, AND THEY

WILL ONLY BE IN THE JURY ROOM WHILE HE'S THERE. AND THEN AFTER YOU'RE DONE LOOKING AT THE GUNS, HE'LL TAKE THE GUNS OUT OF THE JURY ROOM. THEY'RE NOT GOING TO GO INTO THE JURY ROOM UNLESS YOU ASK TO SEE THEM.

THE 911 TAPE AND THE VIDEOTAPES, SAME THING. IF YOU WISH TO RE-HEAR THE 911 TAPE, EITHER THE BAILIFF OR RHE CLERK WILL GO IN AND REPLAY IT FOR YOU AS MANY TIMES AS YOU WISH. YOU HAVE THE TRANSCRIPTS TO GO BY. BUT THOSE TRANSCRIPTS WILL BE COLLECTED AFTER YOU'VE LISTENED TO THE 911 TAPE AND WILL BE REMOVED FROM THE JURY ROOM BECAUSE THEY'RE NOT EVIDENCE.

IF YOU WANT TO SEE THE VIDEOTAPES AGAIN, WE'LL SEND THE TV IN THERE AND SEND THE BAILIFF OR THE CLERK IN TO PLAY THE VIDEOTAPES FOR YOU. THE JURY ROOM IS A LITTLE -- IT'S NOT CROWDED, BUT IT CAN'T REALLY ACCOMMODATE THAT BIG OLD STAND AND TV TOO WELL. SO IF YOU WANT TO HEAR OR SEE THOSE THINGS, JUST LET US KNOW AND WE'LL SET IT UP FOR YOU.

ALL RIGHT. PLEASE FOLLOW DEPUTY WAITE'S DIRECTIONS.

(AT 2:43 P.M. THE JURY RETIRED TO COMMENCE DELIBERATIONS.)

THE COURT: OKAY. TO OUR ALTERNATE JURORS, YOUR ARE BOTH STILL BOUND BY THE ADMONITION THAT YOU MAY NOT CONVERSE AMONGST YOURSELVES NOR WITH ANYONE ELSE ON ANY SUBJECT CONNECTED WITH THIS TRIAL, AND YOU'RE NOT TO FORM OR EXPRESS ANY OPINION ON IT UNTIL THE CASE MAY BE SUBMITTED TO YOU, THAT MEANS UNTIL SUCH TIME AS YOU ARE SUBSTITUTED IN FOR ONE OF THE 12 JURORS NOW DELIBERATING. THIS ALSO MEANS THAT YOU'RE NOT TO DECIDE HOW YOU WOULD VOTE IF YOU WERE

DELIBERATING WITH THE OTHER JURORS.

NOW, WE DO APPEAR TO HAVE 12 JURORS THAT ARE NOW STARTING THEIR DELIBERATIONS. SO AT THE MOMENT, AT LEAST, IT DOESN'T LOOK LIKE WE'RE GOING TO NEED EITHER ONE OF YOU. FOR THAT PURPOSE, I DON'T SEE ANY REASON TO ORDER YOU TO REMAIN HERE AT THE COURTHOUSE. SO IF YOU WOULD LIKE TO GO BACK HOME OR TO WORK, I WILL ALLOW YOU TO DO SO ON ONE CONDITION, THAT IS, IF WE TELEPHONE YOU ON ONE OF THOSE NUMBERS YOU'VE GIVEN TO US, THAT A REAL LIVE HUMAN BEING KIND OF PERSON WILL ANSWER THE PHONE AND SAY HELLO. AND HOPEFULLY THAT PERSON WILL BE YOU OR THAT PERSON WILL BE ABLE TO GET YOU TO THE PHONE WITHIN A FEW SECONDS. WHAT I WANT TO AVOID IS HAVING TO LEAVE A VOICEMAIL MESSAGE AND/OR HAVING SOMEONE HAVE TO TRACK YOU DOWN OR BE AT THE MERCY OF YOU CHECKING THE VOICEMAIL.

IF YOU WOULD GO AHEAD AND LEAVE YOUR NOTEBOOKS ON THE SEAT. HERE'S WHAT'S GOING TO HAPPEN ALSO TO BOTH OF YOU. YOU WILL GET A PHONE CALL THIS AFTERNOON AT ABOUT 4:30 FROM THE CLERK, AND SHE WILL INFORM YOU EITHER THAT THE JURY HAS REACHED A VERDICT AND THAT YOU'RE OFF DUTY COMPLETELY, OR SHE'LL TELL YOU THE JURY HAS BEEN ORDERED BACK FOR TOMORROW, AND YOU'RE GOING TO BE ON DUTY STARTING TOMORROW AT 9 A.M. AND THAT YOU WILL REMAIN ON CALL. SO YOU WILL GET A PHONE CALL FROM US TONIGHT ONE WAY OR THE OTHER.

OKAY. ALL RIGHT. YOU'RE BOTH FREE TO GO. IF WE DON'T SEE EITHER OF YOU AGAIN, THANK YOU SO MUCH FOR YOUR PARTICIPATION AND TIME.

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT

OUT OF THE PRESENCE OF THE JURY:)

THE COURT: COUNSEL, I HAVE A COUPLE OF STIPULATIONS I'D LIKE TO COVER. FIRST OF ALL, MAY IT BE STIPULATED THAT THE JURY CAN RECESS WITHOUT FURTHER ADMONITION AND WITHOUT ASSEMBLING IN THE COURTROOM, AND THAT THEY CAN RESUME THEIR DELIBERATIONS WITH THE BAILIFF'S DETERMINATION THAT ALL 12 ARE PRESENT, MR. LINK?

MR. LINK: YES.

THE COURT: AND MR. GULLEY?

MR. GULLEY: YES.

THE COURT: MAY IT BE STIPULATED ALSO THAT SHOULD THE JURY ASK FOR A READBACK OF A PARTICULAR WITNESS'S TESTIMONY, THAT I CAN SEND THE COURT REPORTER INTO THE JURY ROOM, THAT I CAN INSTRUCT THAT SHE READ THE TESTIMONY FROM BEGINNING TO END DELETING SIDEBAR CONFERENCES, OBJECTIONS, AND THE LIKE, THAT SHE NOT STOP OR RE-READ ANYTHING AND NOT ENTERTAIN ANY QUESTIONS OR REQUESTS FROM THE JURY? AND MAY IT BE FURTHER STIPULATED THAT WE CAN START THIS PROCESS PRIOR TO ACTUALLY GETTING THROUGH TO BOTH OF YOU TO LET YOU KNOW THAT THE REQUEST HAS BEEN MADE?

NOW, LET ME EXPLAIN THAT LAST PART. I WANT TO GET -- I WANT TO GET THE TESTIMONY STARTED. IF ONE OF YOU ARE OUT IN THE BATHROOM, OR OUT IN THE PARKING LOT, OR SOMEBODY CAN'T REACH YOU RIGHT AWAY, WE WANT TO GET THAT PROCESS STARTED IMMEDIATELY. AND WE WILL CALL YOU, AND WE WILL GET THROUGH TO YOU, AND WE WILL TELL YOU THAT IT'S HAPPENING. BUT WE WANT TO START IT BEFOREHAND IF WE HAVE A DELAY IN CONTACTING YOU. UNDERSTOOD AND AGREED, MR. LINK?

MR. LINK: SO STIPULATED.

THE COURT: AND MR. GULLEY?

MR. GULLEY: YES.

THE COURT: AND ARE YOU BOTH GOING TO BE IN THE BUILDING?

MR. GULLEY: YES.

MR. LINK: NO, I BETTER LEAVE A CELL PHONE. I ACTUALLY HAVE A DOCTOR'S APPOINTMENT, WHICH I DON'T PREDICT WILL TAKE MORE THAN AN HOUR. BUT I'LL HAVE SOMEBODY COVERING IN CASE.

THE COURT: WELL, THE DOCTOR -- SO YOU'RE GOING TO BE OUT OF THE BUILDING STARTING NOW FOR AN HOUR?

MR. LINK: IN THE NEXT 15 MINUTES I'LL LEAVE AND TRY TO BE BACK AROUND 4.

THE COURT: WHO SHOULD WE CALL UNTIL 4 O'CLOCK?

MR. LINK: JUST MY CELL PHONE. I'LL RUN BACK HERE. I'LL BE WITHIN 20 MINUTES. IS THAT TOO LONG?

THE COURT: WELL, YEAH. THE PROBLEM IS IF WE GET A WRITTEN NOTE OR SOMETHING.

MR. LINK: I'LL GET BILL COLLINS TO COVER IT, AND I'LL GIVE YOU HIS EXTENSION, TOO.

THE COURT: ALL RIGHT. SO WE'LL CALL YOUR CELL PHONE FIRST. IF IT'S SOMETHING THAT'S GOING TO TAKE SOME TIME, WE'LL CALL COLLINS.

MR. LINK: THANK YOU.

THE COURT: ALL RIGHT. OFF THE RECORD.

(JURY DELIBERATING.)

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT

OUT OF THE PRESENCE OF THE JURY:)

THE COURT: WE'RE BACK ON THE RECORD ON PEOPLE VERSUS CUNNINGHAM. AT THIS POINT, THERE ARE NO JURORS PRESENT. THE JURY DID REQUEST TO LISTEN TO THE 911 TAPE. THAT REQUEST WAS PROVIDED TO THEM AND THEN ABOUT 10 MINUTES AGO, THEY INDICATED THEY DO HAVE A VERDICT.

I NEED TO KNOW WHETHER OR NOT TO ORDER THIS JURY BACK TOMORROW MORNING FOR A TRIAL ON THE PRIORS, ACTUALLY THE ONE PRIOR, THE 211. MR. GULLEY IS THAT GOING TO BE NECESSARY DO YOU THINK, OR NO?

MR. GULLEY: MY CLIENT WAS A LITTLE CONFUSED, BUT I DON'T THINK SO. I THINK HE UNDERSTOOD.

THE COURT: LET'S TRY THIS. MR. CUNNINGHAM, YOU ARE CHARGED WITH A SERIOUS FELONY PRIOR PURSUANT TO THE PENAL CODE AS WELL AS A STRIKE PRIOR. IT'S THE SAME OFFENSE. IT'S A ROBBERY FROM 1983. WHETHER OR NOT THAT WAS YOUR CASE IS AN ISSUE THAT YOU HAVE A RIGHT TO HAVE THIS JURY DETERMINE. YOU HAVE THE RIGHT TO WAIVE A JURY TRIAL ON THAT ISSUE AND LET THE JUDGE DETERMINE IT WITHOUT A JURY, OR YOU HAVE A RIGHT TO ADMIT IT IF IT BECOMES NECESSARY.

NOW, IF YOU'RE FOUND NOT GUILTY -- I MEAN, THE STRIKE PRIOR APPLIES TO ALL THE CHARGES. THE SERIOUS FELONY CHARGE, I THINK, APPLIES TO ONLY MAYBE COUNTS 1 AND 2. BUT BE THAT AS IT MAY, DO YOU UNDERSTAND AND AGREE TO WAIVE OR GIVE UP YOUR RIGHT TO HAVE A RE-TRIAL ON THE ISSUE, THE LIMITED ISSUE OF WHETHER OR NOT THAT'S YOUR ROBBERY CASE BACK IN 1983, WHETHER IT WAS YOU WHO SUFFERED THAT CONVICTION?

THE DEFENDANT: OKAY. ARE YOU ASKING ME?

THE COURT: YEAH. DO YOU UNDERSTAND YOU HAVE A RIGHT TO HAVE THIS JURY MAKE THAT DETERMINATION, AND AT THIS POINT YOU'RE WILLING TO WAIVE THAT RIGHT AND AGREE TO LET ME, THE JUDGE, SITTING ALONE MAKE THAT DETERMINATION; IS THAT CORRECT?

THE DEFENDANT: CORRECT.

THE COURT: IS THAT WITH YOUR KNOWLEDGE AND CONSENT, MR. GULLEY?

MR. GULLEY: IT IS. YOUR HONOR.

THE COURT: THE COURT FINDS THE DEFENDANT HAS KNOWINGLY AND INTELLIGENTLY EXPRESSIVELY AND EXPLICITLY WAIVED HIS RIGHT TO HAVE A JURY DETERMINE WHETHER OR NOT THE PRIOR CONVICTIONS ARE TRUE, AND THAT A NON-JURY TRIAL WILL BE HELD, IF NECESSARY, AT A LATER TIME, AND WE'LL DISCUSS THAT AT THE CONCLUSION OF THE VERDICTS.

ALL RIGHT. WE'RE READY TO BRING THE JURORS IN.

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT IN THE PRESENCE OF THE JURY:)

THE COURT: WE'RE BACK ON THE RECORD ON PEOPLE VERSUS CUNNINGHAM. ALL 12 DELIBERATING JURORS ARE BACK IN THE COURTROOM AND HAVE INFORMED THE BAILIFF THAT A VERDICT HAS BEEN REACHED. MR. CUNNINGHAM, AS WELL AS BOTH ATTORNEYS, ARE PRESENT. IT LOOKS LIKE THE FOREPERSON IS JUROR NUMBER 1.

JUROR NO. 1: YES.

THE COURT: AND [JUROR NO. 1], HAVE YOU AND THE OTHER JURORS REACHED UNANIMOUS VERDICTS ON ALL FOUR COUNTS?

(PER CCP 237, THE NAMES OF ALL SEATED JURORS HAVE BEEN REDACTED TO REFLECT THEIR JUROR SEAT NUMBER.)

JUROR NO. 1: YES, YOUR HONOR, WE HAVE.

THE COURT: HAVE YOU FILLED OUT, AS FAR AS YOU KNOW, ALL OF THE VERDICT FORMS APPROPRIATELY SIGNED AND DATED THEM?

JUROR NO. 1: YES, YOUR HONOR.

THE COURT: PLEASE HAND THE ENVELOPE TO THE BAILIFF. THE COURT NEEDS TO TAKE A MOMENT AND REVIEW THE VERDICT FORMS AND MAKE SURE THAT THEY ARE FILLED OUT.

ALL RIGHT. THE CLERK WILL PLEASE READ THE VERDICTS.

THE CLERK: IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SAN DIEGO, THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF, VERSUS JAMES HENRY CUNNINGHAM, DEFENDANT, SC NUMBER SCE243538, DA NUMBER MAK333. VERDICT, WE THE JURY IN THE ABOVE ENTITLED CAUSE FIND THE DEFENDANT, JAMES HENRY CUNNINGHAM, NOT GUILTY OF THE CRIME OF BURGLARY, RESIDENTIAL, IN VIOLATION OF PENAL CODE SECTION 459 AS CHARGED IN COUNT 1 OF THE INFORMATION. DATED JANUARY 6TH, 2005. SIGNED BY FOREPERSON.

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF, VERSUS JAMES HENRY CUNNINGHAM, DEFENDANT. VERDICT, WE THE JURY IN THE ABOVE ENTITLED CAUSE FIND THE DEFENDANT, JAMES HENRY CUNNINGHAM, GUILTY OF THE CRIME OF ASSAULT WITH A FIREARM IN VIOLATION OF PENAL CODE SECTION 245(A)(2) AS CHARGED IN COUNT 2 OF THE INFORMATION. AND WE FURTHER FIND THAT IN THE COMMISSION AND THE ATTEMPTED COMMISSION OF THE ABOVE OFFENSE, THE DEFENDANT, JAMES HENRY CUNNINGHAM, DID PERSONALLY USE A FIREARM, TO WIT, A SHOTGUN WITHIN THE MEANING OF PENAL CODE SECTION 12022.5(A) AS ALLEGED IN COUNT 2 OF THE INFORMATION.

DATED JANUARY 6TH, 2005. SIGNED BY FOREPERSON.

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF, VERSUS JAMES HENRY CUNNINGHAM, DEFENDANT. VERDICT, WE THE JURY IN THE ABOVE ENTITLED CAUSE FIND THE DEFENDANT, JAMES HENRY CUNNINGHAM, GUILTY OF THE CRIME OF POSSESSION OF A FIREARM BY A FELON IN VIOLATION OF PENAL CODE SECTION 12021(A)(1) AS CHARGED IN COUNT 3 OF THE INFORMATION. DATED JANUARY 6TH, 2005, SIGNED BY FOREPERSON.

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF, VERSUS JAMES HENRY CUNNINGHAM, DEFENDANT. VERDICT, WE THE JURY IN THE ABOVE ENTITLED CAUSE FIND THE DEFENDANT, JAMES HENRY CUNNINGHAM, GUILTY OF THE CRIME OF POSSESSION OF A DEADLY WEAPON IN VIOLATION OF PENAL CODE SECTION 12020(A)(1) AS CHARGED IN COUNT 4 OF THE INFORMATION. DATED JANUARY 6TH, 2005, SIGNED BY FOREPERSON.

THE COURT: ALL RIGHT. THANK YOU, MADAME CLERK. AND THE JURY HAS ALSO RETURNED BACK BLANK THE LESSER INCLUDED SIMPLE ASSAULT VERDICT FORM, AND SO THAT ACCOUNTS FOR ALL FIVE VERDICT FORMS.

MR. GULLEY, DOES THE DEFENSE WISH TO HAVE THE JURY POLLED?

MR. GULLEY: JUST ON COUNT 2, YOUR HONOR, IF POSSIBLE.

THE COURT: AS TO COUNT 2, LADIES AND GENTLEMEN, I'M GOING TO ASK YOU WHETHER OR NOT YOUR VERDICT OF GUILTY AND YOUR TURE FINDING OF THE ALLEGATION WAS AND IS YOUR TRUE AND CORRECT VERDICT.

JUROR NUMBER 1, OUR FOREPERSON, AS TO COUNT 2, WAS THAT

ASK IS THAT YOUR TRUE AND CORRECT VERDICT?

JUROR NO. 1: YES, YOUR HONOR.

THE COURT: SAME QUESTION, JUROR NUMBER 2?

JUROR NO. 2: YES.

THE COURT: JUROR NUMBER 3, SAME QUESTION AS TO COUNT 2?

JUROR NO. 3: YES.

THE COURT: JUROR NUMBER 4, AS TO COUNT 2, WAS THAT AND IS THAT YOUR TRUE AND CORRECT VERDICT?

JUROR NO. 4: YES.

THE COURT: AND JUROR NUMBER 5?

JUROR NO. 5: YES.

THE COURT: JUROR NUMBER 6, SAME QUESTION?

JUROR NO. 6: YES.

THE COURT: JUROR 7?

JUROR NO. 7: YES.

THE COURT: JUROR NUMBER 8, WAS THAT AND IS THAT YOUR TRUE AND CORRECT VERDICT AS TO COUNT 2?

JUROR NO. 8: YES.

THE COURT: JUROR NUMBER 9?

JUROR NO. 9: YES.

THE COURT: AND JUROR NUMBER 10?

JUROR NO. 10: YES.

THE COURT: SAME QUESTION, JUROR NUMBER 11?

JUROR NO. 11: YES, YOUR HONOR.

THE COURT: AND JUROR NUMBER 12?

JUROR NO. 12: YES.

THE COURT: ALL RIGHT. AND ANY DESIRE FROM THE

PEOPLE TO HAVE THE JURY POLLED AS TO COUNTS 3 OR 4?

MR. LINK: NO, YOUR HONOR.

THE COURT: OR 1?

MR. LINK: NO, YOUR HONOR.

THE COURT: OKAY. THE CLERK IS THEREBY INSTRUCTED TO PLEASE RECORD THE VERDICTS.

THE CLERK: VERDICT SO RECORDED.

THE COURT: ALL RIGHT. THANK YOU, LADIES AND GENTLEMEN. YOU'VE NOW COMPLETED YOUR SERVICE AS JURORS IN THIS CASE. AND ON BEHALF OF THE SUPERIOR COURT, I PERSONALLY WANT TO THANK YOU FOR GIVING YOUR TIME AND EFFORTS TO THE ADMINISTRATION OF JUSTICE IN OUR COMMUNITY.

YOU HAVE THE ABSOLUTE RIGHT NOW TO EITHER DISCUSS OR NOT DISCUSS YOUR DELIBERATIONS, YOUR VERDICTS, WITH ANY PERSON, THAT WOULD INCLUDE THE ATTORNEYS OR PEOPLE WITH WHOM YOU LIVE AT HOME, REALLY ANYONE, FOLLOWING YOUR DISCHARGE. HOWEVER, IF ANYONE ATTEMPTS TO DISCUSS THE CASE WITH YOU AND YOU DON'T WANT TO DISCUSS IT, THAT IS YOUR DECISION TO MAKE, AND YOU'RE NOT COMPELLED TO DISCUSS IT WITH ANYONE. IT'S YOUR DECISION ONE WAY OR THE OTHER.

I DON'T ANTICIPATE THERE BEING ANYONE APPROACHING YOU OR TALKING TO YOU WITHOUT YOUR PERMISSION. BUT IF THAT SHOULD HAPPEN, I'M OBLIGATED TO TELL YOU THAT YOU SHOULD TALK TO THE NEAREST BAILIFF OR COME BACK HERE AND TALK TO ME ABOUT IT, AND WE'LL RESOLVE THE SITUATION. ANY UNREASONABLE CONTACT WITH A JUROR BY ANY PERSON WITHOUT THE JUROR'S CONSENT MUST BE IMMEDIATELY REPORTED TO ME, AND ANY VIOLATION OF WHAT I JUST SAID WILL BE CONSIDERED A VIOLATION OF A LAWFUL COURT

ORDER AND WILL BE SUBJECT TO REASONABLE SANCTIONS.

IT'S ALSO HEREBY ORDERED THAT THE COURT'S RECORD OF PERSONAL JUROR IDENTIFICATION INFORMATION INCLUDING JUROR'S NAMES, ADDRESSES, AND TELEPHONE NUMBERS, BE SEALED UNTIL FURTHER ORDER OF THIS COURT.

NOW, IN THE EVENT -- AND I'M REQUIRED ALSO TO TELL YOU BY LAW THAT IF THERE IS ANY REQUEST TO ACCESS ANY OF THAT SEALED INFORMATION, THERE WILL FIRST BE A HEARING SET BY THE COURT BEFORE THIS COURT, MYSELF, AND THE AFFECTED JUROR OR JURORS WILL BE GIVEN WRITTEN NOTICE OF THE TIME AND PLACE OF THE HEARING. AT THE HEARING THE AFFECTED FORMER JUROR MAY APPEAR IN PERSON, IN WRITING, BY TELEPHONE, OR BY COUNSEL, AND REQUEST THAT THE HEARING BE CLOSED SO AS TO PROTECT JUROR ANONYMITY, AND MAY PROTEST THE RELEASE OF THE CONFIDENTIAL INFORMATION. WHETHER OR NOT SUCH INFORMATION OR ANY PART OF IT WILL BE DISCLOSED, AND IF SO UNDER WHAT TERMS, ARE MATTERS WITHIN THE COURT'S SOLE DISCRETION. NOW, I DO NOT ANTICIPATE ANY TYPE OF THIS KIND OF REQUEST. THESE INCIDENTS ARE EXTREMELY RARE. BUT ONCE AGAIN, I AM REQUIRED BY LAW TO TELL YOU THIS.

I HOPE THAT YOUR PARTICIPATION WAS EDUCATIONAL, REWARDING, SATISFACTORY IN ALL RESPECTS. WE THANK YOU ONCE AGAIN FOR YOUR PARTICIPATION IN THIS TRIAL. YOUR JURY SERVICE IS NOW CONCLUDED. THANK YOU. YOU'RE FREE TO GO.

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT OUT OF THE PRESENCE OF THE JURY:)

THE COURT: ALL RIGHT. AS FAR AS THE NON-JURY TRIAL ON THE PRIOR ALLEGATIONS, TOMORROW IS NOT GOING TO BE A

GOOD DAY FOR THE COURT BECAUSE I'M ASSIGNED TO DEPARTMENT 1. ACTUALLY, I'M SORRY, I'M ASSIGNED TO DEPARTMENT 3, AND I'M ASSIGNED TO DEPARTMENT 1 NEXT WEEK. I'M JUST THINKING OF A TIME WE CAN FIT THIS IN. HOW ABOUT LET'S DO IT -- WE'VE GOT THIS OTHER JUROR SCHEDULED TO COME BACK, THE ONE THAT NEVER SHOWED UP ON MONDAY. LET'S CONVENE HERE -- LET'S SHOOT FOR 8:30 A.M. ON MONDAY MORNING AND SEE IF WE CAN GET THE DEFENDANT PRODUCED FOR 8:30. I'M NOT SURE WE CAN, BUT WE'LL DO OUR BEST.

AND WE'LL -- I ASSUME THAT'S GOING. THAT MAY OR MAY NOT BE A TRIAL WITH WITNESSES. I DON'T KNOW WHAT YOUR PLANS ARE, MR. LINK. BUT MANY TIMES IT'S JUST THE DOCUMENTS AND THE PHOTOGRAPHS AND WHAT HAVE YOU. BUT I'D LIKE TO GET IT DONE ON THIS COMING MONDAY, JANUARY THE 10TH, AT 8:30 HERE IN DEPARTMENT 9.

NOW, I HAD PREVIOUSLY INDICATED THAT THE DEFENDANT WOULD NEED TO BE PRODUCED TOMORROW. THAT'S NOW OFF. HE DOES NOT NEED TO BE PRODUCED HERE TOMORROW. HE WILL NEED -- HE WILL BE NEEDED ON JANUARY 10TH, THOUGH, FIRST THING IN THE MORNING FOR THE TRIAL ON THE PRIORS.

ANYTHING FURTHER FROM THE PEOPLE?

MR. LINK: NO, YOUR HONOR.

THE COURT: MR. GULLEY?

MR. GULLEY: NO, YOUR HONOR.

THE COURT: ALL RIGHT. WE'LL BE IN RECESS UNTIL MONDAY MORNING.

(AT 4:46 P.M. AN ADJOURNMENT WAS TAKEN TO RESUME ON MONDAY, JANUARY 10, 2005, AT 8:30 A.M.)

CERTIFICATE OF REPORTER

STATE OF CALIFORNIA)
) ss:
COUNTY OF SAN DIEGO)

THE PEOPLE OF THE STATE OF CALIFORNIA

VS.

JAMES CUNNINGHAM

CASE NO. SCE243538

JANUARY 6, 2005

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I, IRENE PERKINS, CSR NO. 12727, A CERTIFIED SHORTHAND REPORTER IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SAN DIEGO, HEREBY CERTIFY THAT I MADE A SHORTHAND RECORD OF THE PROCEEDINGS HAD IN THE WITHIN CASE AND THAT THE FOREGOING TRANSCRIPT IS A FULL, TRUE, AND CORRECT TRANSCRIPTION OF THE PROCEEDINGS IN THIS CASE.

DATED THIS 13TH DAY OF JUNE, 2005.

Irene Perkins

IRENE PERKINS, CSR 12727
OFFICIAL COURT REPORTER

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(THIS PAGE DESIGNATED PAGE 342-400 FOR BLOCK-NUMBERING PURPOSES ONLY. PROCEEDINGS CONTINUE ON PAGE 401. NOTHING OMITTED.)